# REPORT

ON

# PRODUCTS LIABILITY

---

## ONTARIO LAW REFORM COMMISSION


Ministry of the
Attorney
General

1979

# REPORT

ON

# PRODUCTS LIABILITY

---

## ONTARIO LAW REFORM COMMISSION


Ministry of the
Attorney
General

1979

The Ontario Law Reform Commission was established by section 1 of *The Ontario Law Reform Commission Act* to further the reform of the law, legal procedures and legal institutions. The Commissioners are:

Derek Mendes da Costa, Q.C., LL.B., LL.M., S.J.D., *Chairman*
Honourable George A. Gale, C.C., Q.C., LL.D.
Honourable Richard A. Bell, P.C., Q.C.
W. Gibson Gray, Q.C.
William R. Poole, Q.C.
*Honourable James C. McRuer, O.C., LL.D., D.C.L.

M. Patricia Richardson, M.A., LL.B., is Counsel to the Commission. The Secretary of the Commission is Miss A. F. Chute, and its offices are located on the Sixteenth Floor at 18 King Street East, Toronto, Ontario, Canada.

*The Honourable J. C. McRuer did not participate in the deliberations of the Commission in this Project, and for that reason has not signed this Report.

## TABLE OF CONTENTS

Page

## Part III

## LEGAL DEVELOPMENTS IN ONTARIO AND OTHER JURISDICTIONS



## Part IV

Ontario
Law Reform
Commission

The Honourable R. Roy McMurtry, Q.C.,
Attorney General for Ontario

Dear Mr. Attorney:

Pursuant to section 2(1) (*a*) of *The Ontario Law Reform Commission Act*, the Commission initiated a study of the law relating to products liability.

The need to review this area of the law became apparent during the course of the Commission's examination of the law relating to the sale of goods and, to some extent, this Report may be viewed as a culmination of the Reference regarding Ontario's *Sale of Goods Act* by the former Minister of Justice and Attorney General, the Honourable A. A. Wishart, Q.C. During the course of our review, we have carefully considered the recent developments that have occurred in other provinces, the United States, the United Kingdom and Western Europe.

The Commission has completed its study of this increasingly important area of the law and has the honour to submit herewith its *Report on Products Liability*.

# PART I

## CHAPTER 1

# INTRODUCTION

This Report is concerned principally with the nature and scope of the civil liability of persons who supply defective products to a purchaser, ultimate user or other person for injuries caused by such products. We are not concerned here with the right of a buyer to recover the deficient value of a defective product. This subject has been fully canvassed in the Commission's 1972 *Report on Consumer Warranties and Guarantees in the Sale of Goods* and in its recent *Report on Sale of Goods.*[1] Many of the recommendations made in the Warranties Report were included in the Consumer Products Warranties Bill of 1976.[2] Nor are we concerned in this Report with the administrative and criminal law aspects of product standard regulation.

Deficiencies and anomalies in the law governing products liability became apparent during the course of the Commission's study of the law relating to the sale of goods. For example, under the present law of contract, only a buyer of a defective product can sue for breach of an implied warranty and only a seller can be sued for such a breach. Accordingly, a retailer, who is usually only a distributor of goods, can be held strictly liable for the injuries suffered by his purchaser as a result of a defective product. On the other hand, a manufacturer, who is responsible for putting defective goods into the flow of commerce, generally speaking, can be held liable in tort, but only if the injured party proves negligence. Moreover, this remedy may be ineffective as a practical matter if the manufacturer is unknown, insolvent or beyond the jurisdiction.[3] The Commission was of the view that it would be inappropriate to deal with the tortious aspects of products liability law in the context of the sale of goods. Accordingly, in 1977, work was commenced on a Products Liability Project.

From the outset, we have sought to encourage public participation in order to obtain the views of all persons and groups having an interest in the law relating to products liability. Advertisements requesting briefs were placed in major newspapers, and a background paper was prepared and circulated to assist persons wishing to make submissions. Questionnaires were circulated to members of the Canadian Manufacturers' Association, to members of the Insurance Bureau of Canada, and to insurers and unions

---

[1]Ontario Law Reform Commission (1979), chapters 9 and 10.

[2]Bill 110, 3rd Sess., 30th Legislature. This Bill did not proceed beyond first reading, which it received on June 15, 1976.

[3]A manufacturer who is beyond the jurisdiction, in certain circumstances, may be served out of Ontario under Rule 25(1)(g), (h) and (o) of the Supreme Court of Ontario Rules of Practice, R.R.O. 1970, Reg. 545 as amended. Service *ex juris* is permitted "in respect of a tort committed within Ontario", "in respect of damage sustained in Ontario arising from a tort or breach of contract committed elsewhere", and "against a person out of Ontario who is a necessary or proper party to an action or proceeding properly brought against another person duly served within Ontario". A remedy in these circumstances may nevertheless be practically ineffective because the manufacturer has no assets in Ontario, and because enforcement of an Ontario judgment in a foreign jurisdiction may be problematical.

in an attempt to gauge the practical effect of any change.[4] During the course of our Project, six working papers were prepared for the Commission. We were particularly concerned with the economic implications and the effect on insurance of any change in the law. Accordingly, two of the six working papers prepared for the Commission examined these topics. In addition, we sought the views of the Consumers' Association of Canada, the Commercial, Consumer and Corporate Law Section of the Canadian Bar Association (Ontario Branch), the Ministry of Consumer and Commercial Relations and the federal Department of Consumer and Corporate Affairs.

This Report contains the Commission's recommendations for reform of the law of products liability. With the assistance of Mr. L. R. MacTavish, Q.C., former Senior Legislative Counsel, to whom the Commission is deeply indebted, we have prepared a Draft Bill that gives legislative form to a proposed Products Liability Act. The Draft Bill is annexed to this Report as an Appendix.[5]

We are particularly grateful to Professor Stephen M. Waddams of the Faculty of Law, University of Toronto, Director of the Products Liability Project. His direction and scholarship in this area of the law are reflected throughout this Report. We are also pleased to express our appreciation to the other members of the Research Team: Professor J.B. Dunlop, Faculty of Law, University of Toronto; Professor B.P. Feldthusen, Faculty of Law, University of Western Ontario; Professor H.R. Hahlo, Faculty of Law, University of Toronto; Professor R.A. Hasson, Osgoode Hall Law School, York University; Professor P.W. Hogg, Osgoode Hall Law School, York University; and, Professor J. Swan, Faculty of Law, University of Toronto. We extend our sincere gratitude to Ms. C.L. Sugiyama and Ms. C.D. Rees for their able assistance.

---

[4]The Commission acknowledges with gratitude the assistance of the Canadian Manufacturers' Association and the Insurance Bureau of Canada.

[5]See Appendix 1.

# PART II

# EXISTING LAW RELATING TO PRODUCTS LIABILITY IN ONTARIO

## CHAPTER 2

# THE EXISTING LAW

A person who suffers damage as a result of an injury caused by a defective product may have a number of legal remedies. These remedies may sound both in tort and in contract. The tortious remedies may be based on negligence or on strict liability.[1] Contractual claims may be founded on the breach of one or more of the implied warranties and conditions set out in *The Sale of Goods Act*,[2] or on the breach of some express warranty. In this part of our Report, we will consider the present state of the law of products liability in Ontario, as it is reflected in the various remedies available to a person injured by a defective product.

## 1. Negligence

The present law of products liability in Ontario, as in the other Canadian common law jurisdictions, and in other parts of the Commonwealth such as Australia and New Zealand, is based on English law. The most significant case from the point of view of the development of the law of products liability, as indeed for the law of negligence generally, is the well-known decision of *Donoghue* v. *Stevenson*.[3] In that case, the House of Lords held that if a plaintiff could prove, as the pursuer alleged, that she had been injured by the partly decomposed remains of a snail in a bottle of ginger beer, she would have a cause of action against the manufacturer for negligence. In what was plainly a carefully considered statement, Lord Atkin, delivering one of the speeches in the House of Lords, said:[4]

> . . . a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.

This statement has proved to be the source and origin of almost all subsequent developments in the law of products liability based on negligence. It is in some ways like a code, in that subsequent cases look back to it and base their results upon this statement. Unlike a statutory code, however, the statement has not proved to be restrictive. As cases have arisen that do not fit comfortably into the words chosen by Lord Atkin, the courts have had little difficulty in expanding his formulation to cover the new cases. There can be no doubt that this development has

---

[1] In some jurisdictions, such as the United Kingdom and the United States, a remedy based on a breach of statute may be available, even though the statute itself does not provide expressly for a remedy. Courts in Canada have not been so willing to grant a remedy on the same ground. For a brief discussion of liability imposed for breach of statute, see *infra*, at p. 28.

[2] R.S.O. 1970, c. 421.

[3] [1932] A.C. 562 (H.L.) (Scot.).

[4] *Ibid.*, at p. 599.

been assisted by reliance on Lord Atkin's even more famous general statement in the same case, where he laid the foundation for the modern law of negligence.[5] The statement of Lord Atkin, quoted above, has been expanded in light of subsequent cases, and a convenient way to summarize the negligence side of the law of products liability is to examine each phrase in the statement and the degree to which the law has been extended.[6]

(a) PERSONS LIABLE

Lord Atkin spoke of "a manufacturer of products", and the manufacturer is the most common defendant in products liability cases. The terms "manufacturer's liability" and "producer's liability" are not, however, sufficiently comprehensive to embrace the whole of the field of liability for defective products. Lord Atkin himself spoke of the care required in the "preparation or putting up" of the product. By these words he evidently meant to include some classes of defendant other than those who were manufacturers in the narrow sense. Indeed, on facts like those of *Donoghue* v. *Stevenson*, a defendant could well be the bottler of the beverage, even though he had not manufactured either the bottle or its contents.[7] Again, the "manufacturer" may be a party who assembles a completed product from parts manufactured by other persons: if he is negligent in the assembly, there is no doubt that he can be held liable, even though, in the strict sense, he could not be said to have "manufactured" any particular part of the completed product.[8] The manufacturer of a component part may also be held liable for a defect in that part, even though he would not, in the ordinary sense, be thought of as the manufacturer of the completed product.[9]

Other persons in the chain of distribution of products besides the

---

[5] *Ibid.*, at p. 580: "The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

[6] The cases discussed in this part of the Report are not all cases in which the statement of Lord Atkin in *Donoghue* v. *Stevenson* was considered. However, they are all cases in which it was alleged that an injury was occasioned by a defective product.

[7] See *Shandloff* v. *City Dairy Ltd. and Moscoe*, [1936] O.R. 579, [1936] 4 D.L.R. 712 (C.A.); *Zeppa* v. *Coca-Cola Ltd.*, [1955] O.R. 855, [1955] 5 D.L.R. 187 (C.A.); *Ruegger* v. *Shell Oil Company of Canada Ltd. and Farrow*, [1964] 1 O.R. 88, (1963), 41 D.L.R. (2d) 183 (H.C.J.); *Hart* v. *Dominion Stores Ltd. et al.*, [1968] 1 O.R. 775, (1968), 67 D.L.R. (2d) 675 (H.C.J.); *Swan et al.* v. *Riedle Brewery Ltd.* (1942), 50 Man. R. 62, [1942] 1 W.W.R. 577, [1942] 2 D.L.R. 446 (K.B.); and, see *Bradshaw et al.* v. *Boothe's Marine Ltd. et al.*, [1973] 2 O.R. 646 (H.C.J.) (filler of gas cylinder).

[8] *Murphy* v. *St. Catharines General Hospital et al.*, [1964] 1 O.R. 239, (1963), 41 D.L.R. (2d) 697 (H.C.J.); *Malfroot* v. *Noxal, Ltd.* (1935), 51 T.L.R. 551 (K.B.); *Howard* v. *Furness Houlder Argentine Lines, Ltd. and A. & R. Brown, Ltd.*, [1936] 2 All E.R. 781 (K.B.); *Stennett* v. *Hancock and Peters*, [1939] 2 All E.R. 578 (K.B.). See also *MacPherson* v. *Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916); *Ford Motor Co.* v. *Mathis*, 322 F. 2d 267 (1963).

[9] *Evans* v. *Triplex Safety Glass Co., Ltd.*, [1936] 1 All E.R. 283 (K.B.), at p. 286; *Clark* v. *Bendix Corporation*, 345 N.Y.S. 2d 662 (1973). Note: The English and Scottish Law Commissions were divided on the issue of the liability of manufacturers of components incorporated into a completed product. See Law Com. No. 82 (Scot. Law Com. No. 45), *Liability for Defective Products* (1977), paras. 46 and 81, at pp. 14 and 26.

manufacturer have also been held liable. Importers,[10] wholesalers,[11] distributors,[12] and retailers[13] have all been held liable in negligence by the application of Lord Atkin's statement. It must be added, of course, that the practical application of the standard of care to all persons will vary with the circumstances, so that not all will be held liable so readily as the manufacturer. A retailer, for example, may be liable in negligence if it is reasonable for him to inspect a used car before it is sold.[14] He would not be liable for failing to inspect inaccessible parts of a new car purchased from a reliable manufacturer. The single test of negligence applicable to all these defendants results, as a practical matter, in a very different standard of care in different cases.

Outside the distributive chain itself, liability for negligence has been imposed on repairers and installers of various kinds of product.[15] Those who inspect and certify products may also be liable for their negligence.[16] Occupiers of premises, particularly those inviting persons on to their premises for business purposes, will be liable for failure to exercise reasonable care in respect of products on the premises.[17] One recent case

---

[10] *Phillips et al.* v. *Ford Motor Co. of Canada Ltd. et al.*, [1970] 2 O.R. 714, (1970), 12 D.L.R. (3d) 28 (H.C.J.), reversed on other grounds [1971] 2 O.R. 637, (1971), 18 D.L.R. (3d) 641 (C.A.).

[11] *Watson* v. *Buckley, Osborne, Garrett & Co., Ltd., and Wyrovoys Products, Ltd.*, [1940] 1 All E.R. 174 (K.B.); *Graham* v. *Bottenfield's, Inc.*, 176 Kan. 68, 269 P. 2d 413 (1954); *Canifax* v. *Hercules Powder Co.*, 46 Cal. Rptr. 552 (1965).

[12] *Pack* v. *County of Warner No. 5, Michelson and Oliver Chemical Co. (Lethbridge) Ltd.* (1964), 46 W.W.R. 422, 44 D.L.R. (2d) 215 (Alta. S.C., App. Div.); *Rivtow Marine Ltd.* v. *Washington Iron Works and Walkem Machinery & Equipment Ltd.*, [1974] S.C.R. 1189, [1973] 6 W.W.R. 692, (1973), 40 D.L.R. (3d) 530; *Watson* v. *Buckley, Osborne, Garrett & Co., Ltd., and Wyrovoys Products, Ltd.*, footnote 11, *supra*.

[13] *Nernberg* v. *Shop-Easy Stores Ltd.* (1966), 57 W.W.R. 162, 57 D.L.R. (2d) 741 (Sask. C.A.); *Andrews* v. *Hopkinson*, [1957] 1 Q.B. 229; *Fisher* v. *Harrods, Ltd.*, [1966] 1 Lloyd's Rep. 500 (Q.B.); *Santise* v. *Martins, Inc.*, 17 N.Y.S. 2d 741 (1940).

[14] *Andrews* v. *Hopkinson*, footnote 13, *supra*.

[15] Repair: *Marschler* v. *G. Masser's Garage*, [1956] O.R. 328, (1956), 2 D.L.R. (2d) 484 (H.C.J.); *Stewart* v. *Domingos*, [1967] 2 O.R. 37, (1967), 62 D.L.R. (2d) 282 (C.A.); *Cudney* v. *Clements Motor Sales Ltd.*, [1969] 2 O.R. 209, 5 D.L.R. (3d) 3 (C.A.); *Ives* v. *Clare Bros. Ltd. et al.*, [1971] 1 O.R. 417, (1970), 15 D.L.R. (3d) 519 (H.C.J.); *Malfroot* v. *Noxal, Ltd.*, footnote 8, *supra; Stennett* v. *Hancock and Peters*, footnote 8, *supra; Herschtal* v. *Stewart and Ardern, Ltd.*, [1940] 1 K.B. 155; *Haseldine* v. *C.A. Daw & Son Ltd.*, [1941] 2 K.B. 343 (C.A.); *Power* v. *The Bedford Motor Co., Ltd. and Harris Bros., Ltd.*, [1959] I.R. 391 (S.C.); *Maindonald* v. *Marlborough Aero Club and New Zealand Airways, Ltd.*, [1935] N.Z.L.R. 371 (S.C.). Installation: *Terminal Warehouses Ltd.* v. *J. H. Lock & Sons, Ltd.* (1957), 9 D.L.R. (2d) 490 (Ont. H.C.J.), aff'd (1958), 12 D.L.R. (2d) 12 (Ont. C.A.); *Lock and Lock* v. *Stibor et al.*, [1962] O.R. 963, (1962), 34 D.L.R. (2d) 704 (H.C.J.); *Kirk et al.* v. *McLaughlin Coal & Supplies Ltd.*, [1968] 1 O.R. 311, (1967), 66 D.L.R. (2d) 321 (C.A.); *Ostash* v. *Sonnenberg, Reid and Reginam; Ostash* v. *Aiello* (1968), 63 W.W.R. 257, 67 D.L.R. (2d) 311 (Alta. S.C., App. Div.); *London & Lancashire Guarantee & Accident Co. of Canada* v. *La Cie F. X. Drolet*, [1944] S.C.R. 82; *Malfroot* v. *Noxal, Ltd.*, footnote 8, *supra; Howard* v. *Furness Houlder Argentine Lines, Ltd. and A. & R. Brown, Ltd.*, footnote 8, *supra*.

[16] *Ostash* v. *Sonnenberg, Reid and Reginam*, footnote 15, *supra; London & Lancashire Guarantee & Accident Co. of Canada* v. *La Cie F. X. Drolet*, footnote 15, *supra; Dutton* v. *Bognor Regis Urban District Council*, [1972] 1 Q.B. 373 (C.A.); *Anns* v. *Merton London Borough Council*, [1978] A.C. 728 (H.L.).

[17] *Gartshore* v. *Stevens et al.*, [1967] 2 O.R. 593, (1967), 64 D.L.R. (2d) 582 (H.C.J.); *Nernberg* v. *Shop-Easy Stores Ltd.*, footnote 13, *supra*; *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274, 35 L.J.C.P. 184, aff'd (1867), L.R. 2 C.P. 311 (Ex. Ch.). For a discussion of the categories of entrants and different duties owed by occupiers, see Fleming, *The Law of Torts* (5th ed., 1977), at pp. 432 ff.

goes so far as to give to a person injured by a plate glass door at a shopping mall the benefit of the doctrine of *res ipsa loquitur*[18] in an action against the occupier of the premises.[19] Even the user may himself be liable. In one recent case, the owner of a truck was held liable for injuries caused to a repairman by an exploding tire.[20] The doctrine of *res ipsa loquitur* was also invoked in this case, suggesting, it would seem, that the defendant, as owner of the truck, should have inspected the tire at regular intervals in order to detect the defect.

(b) PERSONS PROTECTED

Lord Atkin, in describing the class of persons protected, used the word "consumer". Further, the area of law now generally known as products liability was formerly known in England as consumer protection.[21] Lord Atkin spoke of "the ultimate consumer" and of a manufacturer owing "a duty to the consumer" to take reasonable care. It is plain, however, that many persons injured by products will not fall into the class of "consumer". In the narrowest sense, perhaps, only food and drink can be said to be "consumed". It should be noted that the word "consumed" may include the concept of use, but even this wider sense of the word is too limited. A pedestrian, for example, injured by a defective car that runs onto the sidewalk as a result of a brake failure, can hardly be called either a consumer or a user of the car.[22] Nor can this expression apply to the spectator at a fireworks display who is injured by defective fireworks.[23] The Anglo-Canadian law of products liability has had no difficulty in accommodating such cases. The general principle of remoteness, however, continues to exercise some limit on the class of persons entitled to recover.

(c) LOSS RECOVERABLE

In relation to recoverable loss, the focus of discussion in products liability cases has generally been personal injuries. The most common justification put forward for the extension of liability is the desirability of compensating individuals in respect of personal injuries caused by defective products. Moreover, it can hardly be doubted that this justification and the desirability of risk-spreading have played a part in the willingness of judges to extend the law in this area. Liability, however, has never been limited to personal injuries. In *Donoghue* v. *Stevenson*, Lord Atkin spoke of injury to the consumer's "life or property",[24] and it has never been doubted that property damage is compensable under the principle of

---

[18] *Res ipsa loquitur* is a rule of law that may be invoked whenever the mere occurrence of an event may be considered as evidence that it was preceded by a failure to exercise reasonable care.

[19] *Pearson* v. *Fairview Corp. Ltd.* (1974), 55 D.L.R. (3d) 522 (Man. Q.B.).

[20] *Westlake* v. *Smith Transport Ltd.* (1973), 2 O.R. (2d) 258, 42 D.L.R. (3d) 502 (H.C.J.).

[21] There is now an English book by Miller and Lovell entitled *Product Liability* (1977), and the phrase, products liability, is now in common English use.

[22] *Stennett* v. *Hancock and Peters*, footnote 8, *supra*.

[23] *Martin* v. *T. W. Hand Fireworks Co. Ltd.*, [1963] 1 O.R. 443, (1962), 37 D.L.R. (2d) 455 (H.C.J.).

[24] Footnote 3, *supra*, at p. 599.

that case. A common example is that of defective animal feed, where only injury to property is foreseeable.[25]

Where a plaintiff can prove personal injury or property damage, he can attach to his claim consequential economic losses.[26] The problem of pure economic loss, that is, loss unconnected with any physical damage, has, however, given rise to considerably more difficulty. It was held by the House of Lords in 1963 in *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*[27] that pure economic loss can be recovered for some kinds of negligence, at least, as in that case, for a negligent misstatement. More recent English cases have suggested that pure economic loss standing alone is not recoverable.[28] In *Ministry of Housing and Local Government* v. *Sharp*,[29] however, Salmon, L.J., said:[30]

> So far, however, as the law of negligence relating to civil actions is concerned, the existence of a duty to take reasonable care no longer depends on whether it is physical injury or financial loss which can reasonably be foreseen as a result of a failure to take such care.

This dictum was adopted by the majority of the Supreme Court of Canada in *Rivtow Marine Ltd.* v. *Washington Iron Works and Walkem Machinery & Equipment Ltd.*[31] In that case a crane, manufactured by the defendant and used by the plaintiff, was discovered to be dangerously defective. The crane was withdrawn from use at the busiest time of the year, and the plaintiff sued for the cost of repair and loss of profits. The Supreme Court of Canada permitted the plaintiff to recover part of its lost profits: namely, the excess of profits lost because of the withdrawal of

---

[25]*Pack* v. *County of Warner No. 5, Michelson and Oliver Chemical Co. (Lethbridge) Ltd.*, footnote 12, *supra*; *Western Processing & Cold Storage Ltd. et al.* v. *Hamilton Construction Co. Ltd. et al.* (1965), 51 W.W.R. 354, 51 D.L.R. (2d) 245 (Man. C.A.); *Grant* v. *Cooper, McDougall, and Robertson, Ltd.*, [1940] N.Z.L.R. 947 (S.C.).

[26]For example, lost wages and the cost of repairing damaged property. See *Seaway Hotels Ltd.* v. *Consumers Gas Co.*, [1959] O.R. 581, (1959), 21 D.L.R. (2d) 264 (C.A.), affirming [1959] O.R. 177, at p. 182, (1959), 17 D.L.R. (2d) 292 (H.C.J.), at p. 297: "[I]f an actionable wrong has been done to the plaintiff he is entitled to recover all the damage resulting from it even if some part of the damage considered by itself would not be recoverable." Also *Algoma Truck & Tractor Sales* v. *Bert's Auto Supply Ltd. et al.*, [1968] 2 O.R. 153, (1968), 68 D.L.R. (2d) 363 (D. Ct.); *British Celanese Ltd.* v. *A. H. Hunt (Capacitors) Ltd.*, [1969] 1 W.L.R. 959, [1969] 2 All E.R. 1252 (Q.B.).

[27][1964] A.C. 465 (H.L.).

[28]*S.C.M. (U.K.) Ltd.* v. *W. J. Whittall & Son Ltd.*, [1971] 1 Q.B. 337 (C.A.); *Spartan Steel & Alloys Ltd.* v. *Martin & Co. (Contractors) Ltd.*, [1973] 1 Q.B. 27 (C.A.). Economic loss in some circumstances may be recoverable: see *Dutton* v. *Bognor Regis Urban District Council*, [1972] 1 Q.B. 373 (C.A.); *Sparham-Souter* v. *Town and Country Developments (Essex) Ltd.*, [1976] Q.B. 858 (C.A.); *Anns* v. *Merton London Borough Council*, [1978] A.C. 728 (H.L.); and, *Batty* v. *Metropolitan Realisations Ltd.*, [1978] Q.B. 554 (C.A.).

[29][1970] 2 Q.B. 223 (C.A.).

[30]*Ibid.*, at p. 278.

[31][1974] S.C.R. 1189, [1973] 6 W.W.R. 692, (1973), 40 D.L.R. (3d) 530, reversing [1972] 3 W.W.R. 735, (1972), 26 D.L.R. (3d) 559 (B.C.C.A.), which reversed (1970), 74 W.W.R. 110 (B.C.S.C.). For a recent Australian case concerning recovery of pure economic loss, see *Caltex Oil (Australian) Pty. Ltd.* v. *The Dredge "Willemstad"* (1976), 51 A.L.J.R. 270 (H.C.A.).

the crane at the busiest time of year, over the loss that would have occurred had the defendant given timely warning of the defect. The case turned on the breach by the manufacturer of its duty to warn of a defect of which it had knowledge, and the application of the case to economic loss in general remains unclear. However, the implications may be far-reaching, as the Court appears to have accepted that there is no general rule excluding economic loss from the scope of recovery.

(d) TYPE OF PRODUCT

*Donoghue* v. *Stevenson* was concerned with a food product, but liability has never been limited to food and drink. Lord Atkin was careful to state his principle in wider terms: he spoke of "products".[32] It was for many years supposed that the application of the principle was limited to chattels, but even this limitation has now been abandoned. The mass production of houses has assumed some of the characteristics of mass production of goods, and it seems anomalous for the liability of a manufacturer to disappear if his product is incorporated into real property. As Adamson, J., said in *Johnson* v. *Summers*:[33]

> I can see no reason why the legal liability for negligently erecting a heavy fixture in a cottage should be different from negligently erecting a similar fixture in a railway coach or in a large motor bus.

In a recent case, the same sentiment was expressed by Lord Denning, M.R.:[34]

> The distinction between chattels and real property is quite unsustainable. If the manufacturer of an article is liable to a person injured by his negligence, so should the builder of a house be liable . . . .
>
> . . . If a visitor is injured by negligent construction, the injured person is entitled to sue the builder, alleging that he built the house negligently. The builder cannot defend himself by saying: 'True I was the builder; but I was the owner as well. So I am not liable.' The injured person can reply: 'I do not care whether you were the owner or not. I am suing you in your capacity as builder and that is enough to make you liable.'

It appears, therefore, that such special immunity as in the past may have been enjoyed by the manufacturer of a product that is incorporated into realty has now disappeared. Indeed, Lord Atkin's choice of the word "product" suggests that he had no such restriction in mind.

(e) METHOD OF DISTRIBUTION

Lord Atkin spoke of a manufacturer "who sells" a product.[35] Sale is, of course, the typical method of distribution of products. Many cases

---

[32]Footnote 3, *supra*, at p. 599.

[33][1939] 1 W.W.R. 362, at p. 365, [1939] 2 D.L.R. 665 (Man. K.B.), at p. 667.

[34]*Dutton* v. *Bognor Regis Urban District Council*, footnote 28, *supra*, at pp. 393-94.

[35]Footnote 3, *supra*, at p. 578: "The question is whether the manufacturer of an article . . . *sold* by him to a distributor . . . is under any legal duty to the ultimate purchaser or consumer . . ." (emphasis added).

decided since *Donoghue* v. *Stevenson*, however, have made it clear that a sale by the defendant is not a requirement of liability.[36] A wider concept, which would seem to restate the present position more accurately than the concept of sale, would be "putting into circulation". Difficulty, however, has arisen with the case of gratuitous transfer; that is to say, gifts or gratuitous bailments. Some cases have suggested that the donor or gratuitous bailor is not liable, even for negligence.[37] No doubt there is good reason for reluctance in imposing liability on one who gives home-made jam or who lends a ladder to a neighbour. On the other hand, where the distribution is made for business purposes, as in the case of a manufacturer's samples, there seems no reason why liability should not be imposed on the same basis as where a manufacturer sells the product. It is neither relevant to the patient injured by a defective drug that his physician received it from the manufacturer as a free sample, nor to the injured pedestrian that the defective car that ran him down had been gratuitously lent by the manufacturer to a potential customer. There is some uncertainty still on this question; but, in a case decided in 1954, Denning, L.J., (as he then was) said that the "decision of the House of Lords in *Donoghue* v. *Stevenson* makes the earlier cases on gifts quite out of date".[38] It would seem probable, therefore, that the principle of liability for negligence extends to all persons who supply goods, whatever means of distribution they use; that is, at least when the distribution is for business purposes.

(f) DEFECTS

For there to be liability under Lord Atkin's statement, it is clear that a product must fall short in some way of what it ought to be; a product, in other words, must be defective. Some test of the concept of "defect", therefore, is required. This must be a general and flexible test; and, it would seem that the concept cannot be defined except in terms of what it was reasonable to expect of the product in all the circumstances. Products will not last forever; developments in knowledge and technology will introduce safety devices that did not exist when particular products were manufactured; and, of course, an expensive product can be expected to be better than a cheap product.

The concept of defect includes both what may be called accidental defects, such as snails in bottles of ginger beer, and also defects due to unsatisfactory design.[39] The distinction is sometimes said to be one

---

[36]For a discussion of privity of contract, see *infra*, at pp. 26-27.

[37]*Blakemore* v. *The Bristol & Exeter Ry. Co.* (1858), 8 E. & B. 1035, 120 E.R. 385 (K.B.); *MacCarthy* v. *Young* (1861), 6 H. & N. 329, 158 E.R. 136 (Ex.).

[38]*Hawkins* v. *Coulsdon and Purley Urban District Council*, [1954] 1 Q.B. 319 (C.A.), at p. 333.

[39]A plaintiff has an easier task when arguing accidental or production defects than he does when arguing design defects. However, there is no reason he should not succeed if he can show that the product fell short of a reasonable standard. See *Davie* v. *New Merton Board Mills Ltd.*, [1959] A.C. 604 (H.L.), at p. 626, *per* Viscount Simonds: "I agree that [a manufacturer] would [be liable] if the fault lay in the design and was due to lack of reasonable care or skill on his part." In *Rivtow Marine Ltd.* v. *Washington Iron Works and Walkem Machinery & Equipment Ltd.*, footnote 12, *supra*, liability was based on a defective design.

between production defects and design defects. Cases involving inadequate labelling of products are an instance of the latter class.

A product is not defective simply because it has inherent risks. Some products, for example, a sharp kitchen knife, must be dangerous in order to be useful.[40] In other cases, such as cigarettes, there is an inherent danger that is generally known and seems accepted by the users of such products. In the case of medical drugs, there may also be an inherent risk. Any such risk, however, must be balanced against the need to alleviate a more serious medical condition. Rabies vaccine is not defective simply because it may be dangerous. A different case is that of a drug, such as thalidomide, that proves to have serious unknown and unexpected side effects. There can be no doubt that such a drug is defective.

As was mentioned above, the development of technology and the growth of public concern with dangerous products may result in the introduction of safety precautions after a product has been distributed. The development of seat belts in automobiles is one example; the development of child-proof containers for drugs is another. The liability of a manufacturer is grounded upon the fact that he has put into circulation a defective product. Accordingly, the time at which he puts the product into circulation would seem to be the relevant time for judging its adequacy.[41]

Nevertheless, the duties of the manufacturer or other supplier of a defective product are not necessarily at an end when the product leaves his hands. In *Rivtow Marine Ltd.* v. *Washington Iron Works and Walkem Machinery & Equipment Ltd.*,[42] the Supreme Court of Canada held both the manufacturer and the distributor of a defective crane liable to its user, where the crane had left their hands and where the manufacturer and the distributor had failed to warn the user of a subsequently discovered defect as soon as it came to their attention. In this context, it may be noted that it is common for manufacturers of motor vehicles to issue warnings of defects discovered after distribution of the product. Indeed, the *Motor Vehicle Safety Act*[43] requires a manufacturer to do so. While the scope of the *Rivtow* case remains in doubt, it appears to impose some duty on the manufacturer after the distribution of the product, at least where the product is initially defective. In the case of a drug such as thalidomide, for example, it may well be that the manufacturer and distributor, on learning of the danger, would have a duty to attempt to minimize the harm caused by the product, by recalling it from retail distributors and by advertising to warn users who had already purchased the drug. Thus, the manufacturer, and also the distributor, of an initially defective product could be held liable if they failed to give appropriate

---

[40]Risk of injury is inherent in many normal and useful household products. See Prosser, "The Fall of the Citadel (Strict Liability to the Consumer)" (1965-66), 50 Minn. L. Rev. 791, at p. 807.

[41]Recent legislation in some American states has reaffirmed this principle by enacting that a product is not defective if it complies with the "state of the art" at the time of initial supply. See also U.S. Dept. of Commerce, *Draft Uniform Product Liability Law*, s. 106, 44 Fed. Reg. 2998 (1979), which is annexed to this Report as Appendix 2.

[42]Footnote 12, *supra*.

[43]R.S.C. 1970, c. 26 (1st Supp.), s. 8.

warnings, even though they might be found not to have been negligent on the basis of their conduct at the date that the product left their hands.

Where the product is not initially defective, the case is not so clear. It seems doubtful, for example, whether a manufacturer of drugs distributed ten years ago, according to the then common practice in a screw-top bottle, would have a duty today to advertise the availability of child-proof containers. Similarly, it seems doubtful that a manufacturer of a 1950 car without seat belts would have an obligation to warn users that there were no seat belts or to offer to install seat belts at his own expense.

There is almost no product that cannot be made dangerous by perverse misuse. Plainly, the manufacturer cannot be liable in every such case, although he will have a duty to warn against foreseeable kinds of misuse. In some cases, moreover, there may be a duty to design the product so as to make it safe in cases of common misuse.[44]

A requirement frequently imposed on manufacturers, and a common source of liability is the obligation to warn against unsafe use. In *Lambert and Lambert* v. *Lastoplex Chemicals Co. Ltd. and Barwood Sales (Ontario) Ltd.*,[45] the Supreme Court of Canada held that the manufacturer of a highly inflammable floor sealer was bound to warn the user, in forceful and specific terms, against the danger of explosion caused by nearby pilot lights. The container in fact bore three separate warnings to the effect that it was inflammable: each of the warnings instructed the user to keep the product away from "open flames". The Supreme Court of Canada held, however, that these warnings were inadequate in view of the failure to draw the user's attention specifically to the danger of pilot lights, including even a pilot light in an adjacent room, as was the situation in the *Lastoplex* case. The manufacturer might, perhaps, feel aggrieved at this decision, and assert that the reasonable user ought surely to realize the danger of pilot lights near an inflammable product. Indeed, the manufacturer may feel that, after an accident, no warning will appear to a court to have been sufficient. An American case on very similar facts even suggests that a specific mention of pilot lights might be insufficient: the Court held that a warning against using the product "near" pilot lights was not sufficient to bring home the danger of a pilot light in an adjacent room behind a closed door.[46] However, from the user's point of view, these decisions do not seem unreasonably favourable. The

---

[44]The adoption of child-proof containers for drugs and cleaning products is an example of a precaution taken against foreseeable misuse: *Spruill* v. *Boyle-Midway, Inc.*, 308 F. 2d 79 (1962). Similarly, a chair must be safe to stand on: *Phillips* v. *Ogle Aluminum Furniture, Inc.*, 106 Cal. App. 2d 650, 235 P. 2d 857 (1951); and, a table must be safe to move: *Dippel* v. *Sciano*, 37 Wis. 2d 443, 155 N.W. 2d 55 (1967). See also (1967-68), 53 Iowa L. Rev. 764, at p. 769. When the use is unintended, it has been held that the proper test to determine the manufacturer's scope of duty is whether the unintended use was foreseeable: *Lovejoy* v. *Minneapolis-Moline Power Implement Co.*, 248 Minn. 319, at p. 326, 79 N.W. 2d 688, at p. 693 (1956) (tractor driven at higher speed than recommended by manufacturer); *Hardman* v. *Helene Curtis Industries, Inc.*, 48 Ill. App. 2d 42, 198 N.E. 2d 681 (1964) (hairspray used near candle); *Canifax* v. *Hercules Powder Co.*, 46 Cal. Rptr. 552 (1965) (dynamite exploding while being handled).

[45][1972] S.C.R. 569.

[46]*Murray et al.* v. *Wilson Oak Flooring Co., Inc.*, 475 F. 2d 129 (1973).

manufacturer knows what he means when he writes on the can "Highly Inflammable". The consumer, even the intelligent and careful consumer, may read the words but may fail to appreciate that this particular product is not merely as highly inflammable as all the other dozens of products that bear that description; this product is so highly inflammable that a pilot light in an adjacent room must be extinguished. When the added fact is considered that floor sealers are commonly used in basements, and that it is in basements that gas appliances with pilot lights are commonly found, the level of liability imposed upon the manufacturer may seem not at all unreasonable. Moreover, other recent Canadian cases have shown that a manufacturer can give adequate warnings. In *Schmitz et al.* v. *Stoveld et al.; MacNaughton Brook Ltd., Third Party,*[47] a warning on a can of floor sealer that specifically mentioned pilot lights "in or near working area" was held to be adequate. In *Lem* v. *Barotto Sports Ltd.,*[48] the manufacturer of a shot-loading machine was held not to be liable for injuries caused by the double-charging of a shot. The manufacturer's instructions were held by the Court to have been adequate in the circumstances.

Warnings are not always addressed directly to the person likely to be injured. In the case of products that may foreseeably injure children, the warning is commonly addressed to the parent or other adult user. In the case of drugs, it may be to the prescribing physician that the warning must be directed. There are other types of product designed to be used only by experts. In *Murphy* v. *St. Catharines General Hospital et al.*,[49] it was said:

> [T]his instrument was never intended or expected to be handled by a member of the public but only by doctors or under their close supervision or instruction. . . .
>
> . . . [H]ere there was a warning to the hospital whose responsibility it was to use the device only through properly trained and supervised personnel.

(g) INTERMEDIATE EXAMINATION

Lord Atkin referred to the duty of a manufacturer who sells products "in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination". In *Donoghue* v. *Stevenson*, the ginger beer was in an opaque bottle. Liability, however, has also been imposed in cases where the product alleged to be defective was contained in a clear bottle.[50] The question is not whether examination of any sort is "possible", but whether such an examination as would in fact reveal the presence of the defect is likely.

If it is admitted that the product was initially defective, the manufacturer

---

[47](1974), 11 O.R. (2d) 17, 64 D.L.R. (3d) 615 (Co. Ct.). Leave to appeal to the Court of Appeal refused, 11 O.R. (2d) 17n, 64 D.L.R. 615n (C.A.).

[48](1976), 1 A.R. 556, 69 D.L.R. (3d) 276 (S.C., App. Div.).

[49][1964] 1 O.R. 239, at p. 254, (1963), 41 D.L.R. (2d) 697 (H.C.J.), at p. 712.

[50]*Mathews* v. *Coca-Cola Co. of Canada Ltd.*, [1944] O.R. 207, [1944] 2 D.L.R. 355 (C.A.); *Zeppa* v. *Coca-Cola Ltd.*, [1955] O.R. 855, [1955] 5 D.L.R. 187 (C.A.).

will rarely escape by saying that he expected someone else to discover and guard against the defect. However, the possibility of intermediate examination may in some cases be relevant. First, if the product was open to intermediate examination, it may also have been open to intermediate damage or contamination after it left the manufacturer's hands. In such a case, if the defect is proved to have been caused by such subsequent tampering with the product, the manufacturer will not be liable for it, unless he is in some way responsible for the conduct of those who did cause the defect. Secondly, in some cases the manufacturer may be able to argue successfully that he expected, and reasonably expected, that after the product left his hands it would be dealt with in such a way as to make it safe. The producer of bulk chemicals, for example, expects them subsequently to be labelled properly. The producer of pork will reasonably expect it to be cooked before being eaten.[51] These are cases in which a subsequent dealing with the product to make it safe can be reasonably expected by the manufacturer. The third instance in which intermediate examination may possibly be relevant is the case where the plaintiff actually knows of the defect in the goods but uses them nevertheless. In cases such as these, the manufacturer may possibly have a defence based on assumption of risk, contributory negligence, or intervening cause.

### (h) BASIS OF LIABILITY

The theoretical basis of liability under the principle of *Donoghue* v. *Stevenson* is, of course, the manufacturer's negligence. However, in practice, the plaintiff who proves that the product was defective when it left the manufacturer's hands, and that he has been injured by the defect, very rarely fails on the ground that negligence cannot be established. The one case that is commonly cited where a manufacturer escaped on such a ground is generally admitted to be anomalous,[52] and has been disapproved in a recent English decision.[53] This practical departure from

---

[51] *Yachetti et al.* v. *John Duff & Sons Ltd. and Paolini*, [1942] O.R. 682, [1943] 1 D.L.R. 194 (H.C.J.).

[52] In *Daniels and Daniels* v. *R. White & Sons, Ltd. and Tarbard*, [1938] 4 All E.R. 258 (K.B.), Mr. and Mrs. Daniels were both made ill by drinking lemonade manufactured by R. White & Sons, Ltd. and supplied by them to Mrs. Tarbard, the licensee of a public house. In an action against the manufacturer for negligence, the plaintiffs failed because the system for checking the bottles at the factory was found to be "fool-proof". Today negligence would almost certainly be found under these circumstances, and the English and Scottish Law Commissions have so noted: "We do not attach too much importance to the actual decision in *Daniels* v. *White*. If the case were heard today, nearly 40 years later, the court would probably be more easily satisfied that R. White & Sons, Ltd. had been negligent." See Law Com. No. 82 (Scot. Law Com. No. 45), *Liability for Defective Products* (1977), para. 28, at p. 8. This view of the Law Commissions is supported by the Ontario Court of Appeal decision in *Heimler* v. *Calvert Caterers Ltd.* (1975), 8 O.R. (2d) 1, 56 D.L.R. (3d) 643, affirming (1975), 4 O.R. (2d) 667, 49 D.L.R. (3d) 36 (Co. Ct.).

[53] *Hill* v. *James Crowe (Cases) Ltd.*, [1978] 1 All E.R. 812 (Q.B.), at p. 816, where MacKenna, J., noting that *Daniels* v. *White* had been "justly criticized", refused to follow it. He stated as follows: "With respect, I do not think that this was a sufficient reason for dismissing the claim. The manufacturer's liability in negligence did not depend on proof that he had either a bad system of work or that his supervision was inadequate. He might also be vicariously liable for the negligence of his workmen in the course of their employment. If the plaintiff's injuries were a reasonably foreseeable consequence of such negligence, the manufacturer's liability would be established under *Donoghue* v. *Stevenson*."

the fault principle is the result of an inference, or perhaps a presumption, of negligence, which arises against the manufacturer when it is shown that he has made and distributed a dangerously defective product. In *Grant* v. *Australian Knitting Mills Ltd.*,[54] Lord Wright said:[55]

> If excess sulphites were left in the garment, that could only be because someone was at fault. The appellant is not required to lay his finger on the exact person in all the chain who was responsible, or to specify what he did wrong. Negligence is found as a matter of inference from the existence of the defects taken in conjunction with all the known circumstances . . . .

There has been some dispute concerning the applicability to products liability cases of the doctrine of *res ipsa loquitur*.[56] Whether this doctrine is appropriate or not, the practical effect of the case law, as was said by Pickup, C.J.O., in *Zeppa* v. *Coca-Cola Ltd.*,[57] is to place upon the manufacturer the burden of disproving negligence, a burden that is virtually impossible to discharge.[58] In another recent Ontario case, *McMorran* v. *Dominion Stores Ltd.*,[59] Lerner, J., said:[60]

> Where the defect arises in the manufacturing process controlled by the defendant, the inference of negligence is practically irresistible: . . . . Either the manufacturer's system was at fault or, if the system was sound, then an individual employee must have been negligent.

It seems plain, therefore, that the courts, in order to allocate losses in ways that seem to them appropriate, and in order to compensate the victims of accidents, have adopted some of the characteristics of strict liability. Where the injured plaintiff proves defect and causation — and it should be noted that these are also requirements of recovery in the strict liability jurisdictions in the United States[61] — he is very likely to succeed.

---

[54][1936] A.C. 85 (P.C.).

[55]*Ibid.*, at p. 101.

[56]In *Donoghue* v. *Stevenson* itself, footnote 3, *supra*, at p. 622, Lord Macmillan said it did not apply, but that "[n]egligence must be both averred and proved". Some cases, however, have used the phrase: see *Mathews* v. *Coca-Cola Co. of Canada Ltd.*, [1944] O.R. 207, [1944] 2 D.L.R. 355 (C.A.); *Interlake Tissue Mills Co. Ltd.* v. *Salmon and Beckett*, [1948] O.R. 950, [1949] 1 D.L.R. 207 (C.A.); *Castle* v. *Davenport-Campbell Co. Ltd. et al.*, [1952] O.R. 565, [1952] 3 D.L.R. 540 (C.A.); *Varga* v. *John Labatt Ltd. et al.*, [1956] O.R. 1007, (1956), 6 D.L.R. (2d) 336 (H.C.J.); *Philco Radio & Television Corpn. of Great Britain Ltd.* v. *J. Spurling, Ltd. et al.*, [1949] 2 All E.R. 882 (C.A.).

[57]Footnote 7, *supra*, [1955] O.R., at pp. 864-65.

[58]*Hill* v. *James Crowe (Cases) Ltd.*, footnote 53, *supra*.

[59](1977), 14 O.R. (2d) 559, 74 D.L.R. (3d) 186 (H.C.J.).

[60]*Ibid.*, 14 O.R. (2d), at p. 565.

[61]Prosser, "The Fall of The Citadel (Strict Liability to the Consumer)" (1965-66), 50 Minn. L. Rev. 791, at p. 840: "Strict liability eliminates both privity and negligence; but it still does not prove the plaintiff's case. He still has the burden of establishing that the particular defendant has sold a product which he should not have sold, and that it has caused his injury. This means that he must prove, first of all, not only that he has been injured, but that he has been injured . . . because the product was defective, or otherwise unsafe for his use."

Notwithstanding this departure from a regime of pure fault, a person injured by a defective product still suffers certain legal and tactical disadvantages under the present law. The first of these is practical in nature. Even though the plaintiff at present may have the benefit of an inference of negligence, the formal requirement that he prove negligence extends the litigation process and involves delay and expense, thereby increasing the pressure on the plaintiff to settle.[62] Secondly, the manufacturer of a product that now proves to have been defective may possibly escape liability under the present law. Even if the plaintiff has the benefit of an inference of negligence, the manufacturer may be able to show that he took all reasonable precautions at the time the product was distributed. Thalidomide is a case in point. The manufacturer of thalidomide settled the actions brought against it in England for several million pounds. However, it was never quite clear that the manufacturer might not have had a defence, had the case come to court, on the grounds that it had no means of knowing of the dangers and that it had taken reasonable precautions to discover any such dangers. It is unlikely that this defence would have been successful. At any rate, and for whatever reason, the defendant and its advisors decided to conclude the English actions by way of settlement rather than by litigation. Nevertheless, there is a doubt. Thirdly, there is the case of a product incorporating defective materials, or a defective part, manufactured by a third person for whom the defendant manufacturer of the completed product is not responsible in law. In such a case, the manufacturer of the completed product is not liable under existing Anglo-Canadian law, although the sub-manufacturer may be liable.[63] Fourthly, it should be pointed out that wholesalers, retailers, and importers, under the negligence rule, will rarely be found liable.[64]

### (i) DEFENCES

Certain defences common to other torts are available to the defendant in a products liability case. The plaintiff must show that the defective product has caused his injury.[65] If the plaintiff actually knows of the defect and continues to use the product, he may be held to have assumed the risk of injury.[66] Where the plaintiff carelessly contributes to his injury

---

[62]See Prosser, "The Assault Upon the Citadel (Strict Liability to the Consumer)" (1959-60), 69 Yale L.J. 1099, at pp. 1114-20.

[63]See *Evans* v. *Triplex Safety Glass Co.*, footnote 9,*supra*; *Clark* v. *Bendix Corporation*, footnote 9, *supra* (liability for sub-manufacturer). No liability for ultimate manufacturer: see *Taylor* v. *Rover Co. Ltd. et al.*, [1966] 1 W.L.R. 1491, [1966] 2 All E.R. 181; see also Fleming, footnote 17, *supra*, at p. 511; (But in *Murphy* v. *St. Catharines General Hospital*, [1964] 1 O.R. 239, at p. 249, Gale, J., stated: "Deseret [the manufacturer] is responsible for any defect introduced by the producers of the component parts of the instrument. . . .")

[64]*Supra*, at pp. 8-9.

[65]See Prosser, footnote 61, *supra*.

[66]Voluntary assumption of risk, if successful, operates as a complete defence, and it may be suggested that for this reason the court will be reluctant, except in the case of the clearest evidence, to find that the plaintiff did actually assume the risk of injury. See Linden, *Canadian Negligence Law* (1972), at p. 373: "The operation of *volenti* has thus been limited to those situations in which there is an express or implied agreement by the plaintiff to exempt the defendant." See also *Lehnert* v. *Stein*, [1963] S.C.R. 38, at p. 43, (1962), 36 D.L.R. (2d) 159, at p. 164, *per* Cartwright, J.: ". . . the burden lies upon the defendant of proving that the plaintiff, expressly or by necessary implication, agreed to exempt the defendant from liability. . . ."

by not observing defects that he ought reasonably to have observed, by underestimating the significance of what he does observe, by failing to read instructions, or by misusing the product, liability may be apportioned under statutory powers.[67] General principles of remoteness will also be applicable in the case of unforeseeable or unexpected injuries. In general, however, it would seem to be a fair statement that these defences are not commonly successful. The court appears to sympathize with a plaintiff who is injured by a product that is admitted to have been defective when it left the manufacturer's hands. The availability of these defences, therefore, in practice, does not detract markedly from the level of liability now imposed on the manufacturer.

2. Torts of Strict Liability

A negligence regime is to be contrasted with a principle of strict liability. Under the latter principle, the plaintiff is entitled to succeed without proof of negligence or lack of due care on the part of the defendant. Although no principle of strict liability for damage caused by defective products has been openly adopted in Anglo-Canadian jurisdictions, the concept of strict liability is by no means unknown to our law. This is apparent from a brief reference to the rule in *Rylands* v. *Fletcher*[68] and to the law of nuisance.

In the well-known case of *Rylands* v. *Fletcher*, a landowner was held liable for flooding a mine on neighbouring land in the course of constructing a reservoir. Liability was imposed, even though the landowner was found to have acted without fault. Blackburn, J., in a passage quoted with approval in the House of Lords, stated as follows:[69]

> . . . the person who, for his own purposes, brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril; and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.

Blackburn, J., drew analogies to the law of cattle trespass, nuisance, and the escape of filth from a privy.[70]

These analogies might possibly have been extended to cover the case of liability for dangerously defective products; though it should be noted, of course, that it is the landowner, or, in the case of a product, the user, and not the manufacturer who is held liable under the rule in *Rylands* v. *Fletcher*. Many of the arguments that have been used by modern scholars to justify the rule in *Rylands* v. *Fletcher*, such as risk-spreading

---

[67] *The Negligence Act*, R.S.O. 1970, c. 296, s. 2(1) as amended by S.O. 1977, c. 59, s. 1(1): "Where damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent, and, where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss . . . but as between themselves . . . each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent."

[68] (1868), L.R. 3 H.L. 330.

[69] *Ibid.*, at pp. 339-40.

[70] *Ibid.*, at p. 340.

and enterprise liability, have also been used to justify strict products liability. Indeed, there have been several cases involving defective or dangerous products that have been decided on the principle of *Rylands* v. *Fletcher*. The cases include escape of fluids from pipes,[71] the collapse of a flagpole in a public park,[72] a defective amusement device,[73] and the use of explosives [74] and herbicides.[75]

In some ways, cases decided under the principle of *Rylands* v. *Fletcher* go further than a principle of strict liability for defective products. If, for example, liability is imposed for damage caused by explosives under the principle of *Rylands* v. *Fletcher*, such liability may ensue from the causing of damage by the explosives, even though there is nothing wrong with the explosives themselves; in other words, even though there is no defect in the product.

There are also some cases decided in nuisance where defendants have been held liable for injuries caused by products.[76] Again, liability is strict, in the sense that use of due care is not necessarily an answer.[77]

The significance of these instances of strict liability for damage caused by products should not be overstated. The cases are not large in number, and no general principle of strict liability for defective products has been announced by any court. Nevertheless, the cases show that strict liability is not a concept that is alien to our system of tort law and, further, that strict liability has been used on occasion in order to impose liability for defective products.

## 3. Warranties

### (a) Express warranties

Up to this stage in our Report, we have considered those rules that ground liability for defective products in the law of torts. Liability may also be based on contractual principles. We now turn to discuss liability for defective products in contract.

Since early times, the law of warranties has provided a remedy for a false statement inducing sale.[78] The law of warranties was originally

---

[71] *Midwood & Co. Ltd.* v. *Mayor, Aldermen and Citizens of Manchester*, [1905] 2 K.B. 597 (C.A.); *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.*, [1914] 3 K.B. 442 (C.A.).

[72] *Shiffman* v. *The Grand Priory in the British Realm of the Venerable Order of the Hospital of St. John of Jerusalem*, [1936] 1 All E.R. 557 (K.B.), at pp. 561-62, *per* Atkinson, J.

[73] *Hale* v. *Jennings Bros.*, [1938] 1 All E.R. 579 (C.A.).

[74] *MacDonald* v. *Desourdy Const. Ltee.* (1972), 27 D.L.R. (3d) 144 (N.S.S.C., T.D.).

[75] *Mihalchuk* v. *Ratke* (1966), 55 W.W.R. 555, 57 D.L.R. (2d) 269 (Sask. Q.B.).

[76] See *Tarry* v. *Ashton* (1876), 1 Q.B.D. 314; *Wringe* v. *Cohen*, [1940] 1 K.B. 229 (C.A.), at p. 248, *per* Atkinson, J.: "If premises become dangerous as the result of something done by an occupier and they cause damage, the occupier is liable although he did not know of the danger and was not negligent in not knowing."

[77] *Read* v. *J. Lyons & Co.*, [1947] A.C. 156 (H.L.), at p. 183, *per* Lord Simonds: "For if a man commits a legal nuisance it is no answer to his injured neighbour that he took the utmost care not to commit it. There the liability is strict. . . ."

[78] See Ames, "The History of Assumpsit" (1888-89), 2 Harv. L. Rev. 1, at p. 8; Williston, "What Constitutes an Express Warranty in the Law of Sales" (1907-08), 21 Harv. L. Rev. 555.

viewed as a species of deceit, a tortious action, but one giving rise to damages only to the extent of the loss caused by entering into the disadvantageous sale.[79] The promissory associations of warranty, as developed in the nineteenth century, had both an enlarging and a restricting effect. In the context of products liability, liability was enlarged by the application of the rule in *Hadley* v. *Baxendale*,[80] making the seller liable for all natural consequences of the breach of warranty. These consequences were held to include not only loss caused by the sale, but also loss caused by the use of the goods.[81] On the other hand, the association of warranty with promise had a restricting effect, in that some cases held that a warranty required promissory intention.[82] This requirement, however, has not proved to be unduly restrictive in practice, and a number of recent cases have imposed liability for breach of warranty without very convincing proof of contractual intent.[83]

The significance of the device of warranty has been much increased in one respect. In recent years, the courts have, on occasion, applied the concept of collateral contract.[84] In this way, liability can be imposed, for example, on a manufacturer-advertiser for the accuracy of his statements, even though the plaintiff may purchase the goods from a third party for whom the advertiser is not responsible.[85] The reasoning is as follows:

---

[79]Older cases held that the "tortious" measure of damages applied, protecting the buyer's "reliance interest" but not, apparently, his "expectation interest". See *Lomi* v. *Tucker* (1829), 4 Car. & P. 15, 172 E.R. 586 (K.B.); *De Sewhanberg* v. *Buchanan* (1832), 5 Car. & P. 343, 172 E.R. 1004 (C.P.); *Watson* v. *Denton* (1835), 7 Car. & P. 85, 173 E.R. 38 (C.P.); *Mooers* v. *Gooderham and Worts Ltd.* (1887), 14 O.R. 451 (Ch. D.).

[80](1854), 9 Exch. 341, 156 E.R. 145.

[81]*Brown* v. *Edgington* (1841), 2 Man. & G. 279, 133 E.R. 751 (C.P.); *Randall* v. *Raper* (1858), E.B. & E. 84, 120 E.R. 438 (K.B.); *Smith* v. *Green* (1875), 1 C.P.D. 92, 45 L.J.Q.B. 28; *Randall* v. *Newson* (1877), 2 Q.B.D. 102 (C.A.); for a contrary suggestion see the dicta of Erle, C.J., and Willes, J., in *Mullett* v. *Mason* (1866), L.R. 1 C.P. 559, at pp. 563-64. See also *Wren* v. *Holt,* [1903] 1 K.B. 610 (C.A.); *Preist* v. *Last*, [1903] 2 K.B. 148 (C.A.); *Grant* v. *Australian Knitting Mills Ltd.*, footnote 54, *supra.*

[82]*Heilbut, Symons & Co.* v. *Buckleton*, [1913] A.C. 30 (H.L.).

[83]*Adelaide Motors Ltd.* v. *Alexander* (1962), 48 M.P.R. 258 (Nfld. S.C.); *Dick Bentley Productions Ltd.* v. *Harold Smith (Motors), Ltd.*, [1965] 1 W.L.R. 623, [1965] 2 All E.R. 65 (C.A.); *Andrews* v. *Hopkinson,* footnote 13, *supra*; *Esso Petroleum Co. Ltd.* v. *Mardon*, [1976] Q.B. 801 (C.A.). And in a refreshing example of judicial frankness Lord Denning said (extra-judicially), "In English law an innocent misrepresentation may give rise to a right of rescission where that is possible, but not to a right of damages. That has never given us any difficulty in practice. Whenever a judge thinks that damages ought to be given, he finds that there was a collateral contract rather than an innocent misrepresentation. In practice when I get a representation prior to a contract which is broken and the man ought to pay damages I treat it as a collateral contract. I have never known any of my colleagues to do otherwise.": Allan, "The Scope of the Contract: Affirmations or Promises made in the Course of Contract Negotiations" (1967), 41 Aust. L.J. 274, at p. 293.

[84]A collateral contract may be said to exist when a promise is given by A to C, prior to the making of the main contract between B and C, but for which that contract would not have been made. It may also exist in a two-party situation. See Waddams, *The Law of Contracts* (1977), at pp. 259-60; Fridman, *The Law of Contract in Canada* (1976), at pp. 240-41; and, Furmston (ed.), *Cheshire & Fifoot's Law of Contract* (9th ed., 1976), at pp. 58-61.

[85]*Murray* v. *Sperry Rand Corp. et al.* (1979), 5 B.L.R. 284 (Ont. H.C.J.); *Shanklin Pier Ltd.* v. *Detel Products Ltd.*, [1951] 2 K.B. 854, [1951] 2 All E.R. 471; see also *Brown* v. *Sheen and Richmond Car Sales Ltd.*, [1950] 1 All E.R. 1102, [1950] W.N. 316 (K.B.); *Andrews* v. *Hopkinson*, footnote 13, *supra*; *Yeoman Credit Ltd.* v. *Odgers*, [1962] 1 W.L.R. 215, [1962] 1 All E.R. 789 (C.A.); and, *Wells (Merstham) Ltd.* v. *Buckland Sand and Silica Ltd.*, [1965] 2 Q.B. 170.

the advertiser warrants the truth of his statements and, in return, the plaintiff enters into a contract of sale with the third party, an act that indirectly benefits the advertiser. This would amount to an imposition of strict liability on the advertiser for the accuracy of his advertisement. This analysis seems to be firmly embedded in the cases, although it should be noted that they are few in number.[86]

### (b) IMPLIED CONDITIONS OF FITNESS FOR PURPOSE AND MERCHANTABLE QUALITY: SECTION 15 OF THE ONTARIO SALE OF GOODS ACT[87]

Section 15 of *The Sale of Goods Act*[88] codifies the two implied warranties that form the basis of the seller's liability to the buyer in respect of the quality of the goods. Section 15 provides as follows:

> 15. Subject to this Act and any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:
>
> 1. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description that it is in the course of the seller's business to supply (whether he is the manufacturer or not), there is an implied condition that the goods will be reasonably fit for such purpose, but in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose.
>
> 2. Where goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or not), there is an implied condition that the goods will be of merchantable quality, but if the buyer has examined the goods, there is no implied condition as regards defects that such examination ought to have revealed.
>
> 3. An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.
>
> 4. An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

Paragraphs 1 and 2 of this section have been so interpreted as to impose what is, in effect, strict liability on a business seller for the supply of defective goods.

The condition of reasonable fitness for the buyer's purpose applies to

---

[86]Liability for a negligent statement will be examined *infra*, at pp. 28-30.

[87]For a discussion of these implied conditions and recommendations for their reform, see Ontario Law Reform Commission, *Report on Sale of Goods* (1979), ch. 9, at pp. 206-22.

[88]R.S.O. 1970, c. 421.

most sales made in the course of a business. The "particular purpose" has been held to include an ordinary purpose, so that even though the buyer has no special use for the goods, except the ordinary use that all buyers can be expected to make of them, he will be protected by section 15.1.[89] The requirement that the buyer make known his purpose to the seller has also been interpreted favourably to the buyer;[90] in practice, the courts protect the buyer, unless he does not in fact rely, or it is unreasonable for him to rely, on the seller's skill or judgment.[91] The goods may be of a description that it is "in the course of the seller's business" to supply, even though the seller has never before supplied such goods.[92] The patent or other trade name exception in section 15 has not been interpreted to give a defence to the seller, unless the buyer shows, by asking for the goods by a trade name, that he does not rely on the seller's skill or judgment at all.[93]

The condition of merchantable quality has also been interpreted in the buyer's favour. It has been held that virtually any sale can be a sale "by description",[94] and that any seller who sells in the course of business may be a dealer in goods of that description.[95] The reference to examination of the goods by the buyer has not been interpreted so as to impose a duty on the buyer to make an examination.[96] Although many attempts have been made to

---

[89]*Grant* v. *Australian Knitting Mills Ltd.*, footnote 54, *supra*. Compare, *Preist* v. *Last*, footnote 81, *supra*: *Griffiths* v. *Peter Conway, Ltd.*, [1939] 1 All E.R. 685 (C.A.); see also *Gorman* v. *Ear Hearing Services Ltd.* (1969), 8 D.L.R. (3d) 765 (P.E.I. S.C.).

[90]The courts are willing in many cases to presume reliance of the buyer from the very fact of the purchase, especially in a consumer purchase. See *Grant* v. *Australian Knitting Mills Ltd.*, footnote 54, *supra*, at p. 99; *Henry Kendall & Sons* v. *William Lillico & Sons Ltd.*, [1969] 2 A.C. 31 (H.L.), at p. 84, *per* Lord Reid; *Ashington Piggeries Ltd.* v. *Christopher Hill, Ltd.*, [1972] A.C. 441, [1971] 1 All E.R. 847 (H.L.).

[91]Following the recommendation of the English and Scottish Law Commissions, the corresponding section of the U.K. Act has now been amended to this effect: Law Com. No. 24 (Scot. Law Com. No. 12), *Exemption Clauses in Contracts, First Report: Amendments to the Sale of Goods Act, 1893* (1969), at pp. 13-14, 48; *Supply of Goods (Implied Terms) Act, 1973*, c. 13 (U.K.), s. 3(3).

[92]*Buckley* v. *Lever Bros. Ltd.*, [1953] O.R. 704, [1953] 4 D.L.R. 16 (H.C.J.); *Ashington Piggeries Ltd.* v. *Christopher Hill, Ltd.*, footnote 90, *supra*.

[93]Atiyah, *The Sale of Goods* (5th ed., 1975), at p. 97, notes that this exception has been virtually interpreted out of existence by the case of *Baldry* v. *Marshall*, [1925] 1 K.B. 260 (C.A.). In that case, it was held that, where, on the seller's recommendation, the buyer ordered a "Bugatti" car as suitable for touring purposes, the warranty applied. The patent name exception is thus not full protection for the seller, but merely one way in which reliance can be disproved. The U.K. *Sale of Goods Act* has now deleted the exception on the recommendation of the Law Commissions: footnote 91, *supra*, at pp. 12 and 48. Even where the exception is held to apply, the buyer may have an equivalent remedy under section 15.2 for breach of the warranty of merchantability.

[94]Atiyah has suggested that the only sale that will not be a sale by description is one where there is, in effect, an agreed exclusion of liability. Atiyah, footnote 93, *supra*, at pp.74-76.

[95]*Henry Kendall & Sons* v. *William Lillico & Sons Ltd.*, footnote 90, *supra*. The requirement that the seller be a dealer in goods of the description has been deleted from the U.K. Act as proposed by the Law Commissions so that the condition applies to all sales in the course of business: *Supply of Goods (Implied Terms) Act, 1973*, c. 13 (U.K.), s. 3(2). See also Law Com. No. 24 (Scot. Law Com. No. 12), footnote 91, *supra*, at p. 11.

[96]Atiyah, footnote 93, *supra*, at p. 83. Compare, *Thornett & Fehr* v. *Beers & Son*, [1919] 1 K.B. 486. See also *Niagara Grain & Feed Co.* v. *Reno* (1916), 38 O.L.R. 159, 32 D.L.R. 576 (C.A.).

define the phrase "merchantable quality",[97] all the definitions embrace the case of a product that is dangerously defective.[98]

In most products liability cases, therefore, both paragraphs 1 and 2 of section 15 will apply. As Lord Wright said in *Grant* v. *Australian Knitting Mills Ltd.*:[99]

> [s.15.2] in a case like this in truth overlaps in its application [s.15.1]; whatever else merchantable may mean, it does mean that the article sold, if only meant for one particular use in ordinary course, is fit for that use.

Therefore, in the ordinary case of a consumer buying goods from a retailer, one or both of these paragraphs is almost certain to apply. It should be noted that the implied conditions contained in section 15 of *The Sale of Goods Act* cannot, by reason of section 44*a* of *The Consumer Protection Act,* be negatived or varied in the case of goods sold by a consumer sale.[100] These conditions, however, may be negatived or varied in any other contract for the sale of goods.

Liability for breach of the implied conditions is strict. It is irrelevant that the seller has taken all reasonable care to avoid or to detect the presence of the defect. Even though the defect is undiscoverable, the seller is liable.[101] As Lord Reid said in *Henry Kendall & Sons* v. *William Lillico & Sons Ltd.*:[102]

> If the law were always logical one would suppose that a buyer, who has obtained a right to rely on the seller's skill and judgment, would only obtain thereby an assurance that proper skill and judgment had been exercised, and would only be entitled to a remedy if a defect in the goods was due to failure to exercise such skill and judgment. But the law has always gone farther than that. By getting the seller to undertake to use his skill and judgment the buyer gets under s. 14(1) [that is, s.15.1 of the Ontario Act] an assurance that the goods

---

[97]*Bristol Tramways & Carriage Co. Ltd.* v. *Fiat Motors, Ltd.*, [1910] 2 K.B. 831 (C.A.), at p. 841, *per* Farwell, L.J.: "The phrase in s. [15.2] is, in my opinion, used as meaning that the article is of such quality and in such condition that a reasonable man acting reasonably would after a full examination accept it under the circumstances of the case in performance of his offer to buy that article. . . ." In *Australian Knitting Mills Ltd.* v. *Grant* (1933), 50 C.L.R. 387 (H.C.A.), at p. 418, Dixon, J., added an explicit reference to price: "The condition that goods are of merchantable quality requires that they should be in such an actual state that a buyer fully acquainted with the facts and, therefore, knowing what hidden defects exist and not being limited to their apparent condition would buy them without abatement of the price obtainable for such goods if in reasonably sound order and condition and without special terms." In *B. S. Brown & Son Ltd.* v. *Craiks Ltd.*, [1970] 1 All E.R. 823 (H.L.), the conclusion was that price, while sometimes a relevant factor, is not determinative. Lord Reid said, at p. 825: "I do not think that it is possible to frame, except in the vaguest terms, a definition of 'merchantable quality' which can apply to every kind of case."

[98]A defective product that injures someone is certain to be held unmerchantable. See *Supply of Goods (Implied Terms) Act, 1973,* c. 13 (U.K.), s. 7(2). The reference to the price "(if relevant)" appears to recognize that in many cases of consequential damage the price of the goods is not relevant. In *Buckley* v. *Lever Bros. Ltd.*, footnote 92, *supra*, for example, the goods may well have been worth their price.

[99]Footnote 54, *supra*, at pp. 99-100.

[100]R.S.O. 1970, c. 82 as amended by S.O. 1971 (Vol. 2), c. 24, s. 2(1).

[101]See *Buckley* v. *Lever Bros. Ltd.*, footnote 92, *supra*; *Frost* v. *The Aylesbury Dairy Co. Ltd.*, [1905] 1 K.B. 608 (C.A.); *Godley* v. *Perry*, [1960] 1 W.L.R. 9, [1960] 1 All E.R. 36 (Q.B.).

[102]Footnote 90, *supra*, at p. 84.

> will be reasonably fit for his purpose and that covers not only defects which the seller ought to have detected but also defects which are latent in the sense that even the utmost skill and judgment on the part of the seller would not have detected them.

In order to succeed, the buyer must prove a defect, that is, that the goods were not "reasonably fit" or not "merchantable". But when he has proved either of these things, he will succeed without proof that the seller was negligent. It is true to say, therefore, that the seller of goods in the course of a business is, generally speaking, strictly liable to the buyer for damage caused by defects in the goods.

(c) MEASURE OF DAMAGES FOR BREACH OF WARRANTY

The famous case of *Hadley* v. *Baxendale*[103] was designed to limit the liability of a defendant for breach of contract. This case achieved that limitation by holding that a person in breach of contract was only to be responsible for damages that he ought reasonably to have contemplated as liable to happen as the direct and natural consequence of the breach of contract.[104] Curiously enough, in the context of products liability, *Hadley* v. *Baxendale* had an enlarging, rather than a restricting, effect on the liability of a person in breach. The reason is that this rule, codified by section 51(2) of *The Sale of Goods Act,*[105] was early held to make the seller liable not only for economic loss caused by defects in the goods, but also for property damage and personal injuries. Even though the seller was not negligent in creating the defect, or in failing to detect it, the rule in *Hadley* v. *Baxendale* made him liable for such damages. This rule has been applied so as to ask whether a reasonable person, knowing of the defect in the goods, would foresee injury as a direct and natural result. When a plaintiff is before the court complaining of that very injury, it is always difficult to say that it could not have been foreseen as a natural result.

The effect, therefore, of measuring liability under section 15 by the rule in *Hadley* v. *Baxendale* is that it may enable an injured plaintiff to recover damages far beyond the value of the goods sold or the price paid. A striking example is the Ontario case of *Buckley* v. *Lever Bros. Ltd.,*[106] where the plaintiff purchased an apron and some plastic clothespins from the defendant for a price of fifty cents. One of the clothespins shattered in use and the plaintiff lost the sight of one eye. The defendant was held liable for breach of section 15 of *The Sale of Goods Act* and the plaintiff recovered substantial compensation for the personal injuries suffered. Another example is the English case of *Godley* v. *Perry*[107] where a similar injury occurred to a small boy on the shattering of a plastic sling-shot that he had bought from the defendant for the price of six pence.

(d) PRIVITY OF CONTRACT

There is a striking limitation on the scope of strict liability under section 15. The section applies only where there is a contract between the plaintiff and

---

[103]Footnote 80, *supra.*

[104]*Ibid.*

[105]Section 51(2) of *The Sale of Goods Act*, R.S.O. 1970, c. 421 provides as follows:

> 51.(2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting in the ordinary course of events from the breach of warranty.

[106]Footnote 92, *supra.*

[107]Footnote 101, *supra.*

the defendant for the sale of goods. This limitation has two dimensions: only a seller can be liable and only to a buyer. Thus, although the plaintiff in the *Lever Bros. Ltd.* case recovered for her injuries, her husband or a neighbour similarly injured would not have recovered for breach of implied condition. Similarly, if A and B are injured in a motor vehicle accident caused by a defective part, A, the buyer of the car, would have a claim under the section, but B, his passenger, would not.[108] Further, if two persons, A and B, are injured by exploding bottles in a supermarket, the right of each to recover against the supermarket may well turn on the question whether they had paid for the goods at the cash desk when the injury occurred.[109] If A had paid for the goods, but B had not, only A could seek redress under section 15; B would be relegated to a claim under the principles of *Donoghue* v. *Stevenson,* earlier discussed. The contractual principles, therefore, that have led to the evolution of strict liability in this context, necessarily impose on that liability severe restrictions.

### (e) NON-SALE TRANSACTIONS

Although section 15 of *The Sale of Goods Act* applies only to sale transactions, it has been held in a number of cases that the implied warranties apply to non-sale transactions of various sorts. Transactions involving "free samples"[110] and other goods, not themselves the subject of a contract of sale but supplied along with articles sold,[111] have been brought within the words of section 15. Analogous warranties have been held to apply to contracts for services,[112] contracts of bailment,[113] and certain real estate transactions.[114] It

---

[108]*Sigurdson et al.* v. *Hillcrest Service Ltd. and Acklands Ltd. (Third Party),* [1977] 1 W.W.R. 740, (1976), 73 D.L.R. (3d) 132 (Sask. Q.B.).

[109]*Hart* v. *Dominion Stores Ltd. et al.*, [1968] 1 O.R. 775, (1968), 67 D.L.R. (2d) 675 (H.C.J.). Compare, *McMorran* v. *Dominion Stores Ltd. et al.* (1977), 14 O.R. (2d) 559, 74 D.L.R. (3d) 186 (H.C.J.).

[110]See *Fillmore's Valley Nurseries Ltd.* v. *North American Cyanamid Ltd.* (1958), 14 D.L.R. (2d) 297 (N.S.S.C., T.D.), at p. 304, *per* Ilsley, C.J.: "I find that in substance the arrangement was that the defendant would supply 33 lbs. for the price of 25. It seems to me that if a clothing dealer advertises a suit of clothes at say $100 with an extra pair of trousers as a free gift, the whole transaction constitutes a sale, and the implied conditions in the *Sale of Goods Act* . . . apply to both pairs of trousers, just as they would if he advertised the suit with two pairs of trousers for $100."

[111]*Bradshaw* v. *Boothe's Marine Ltd.*, footnote 7, *supra*; *Marleau* v. *The People's Gas Supply Co. Ltd.*, [1940] S.C.R. 708, [1940] 4 D.L.R. 433; *Geddling* v. *Marsh*, [1920] 1 K.B. 668; *Wilson and another* v. *Rickett Cockerell and Co. Ltd.*, [1954] 1 Q.B. 598 (C.A.).

[112]*A.G. Can. and Laminated Structures Holdings Ltd.* v. *Eastern Woodworkers Ltd.*, [1962] S.C.R. 160, (1962), 46 M.P.R. 219, 32 D.L.R. (2d) 1; *G. H. Myers and Co.* v. *Brent Cross Service Co.*, [1934] 1 K.B. 46; *Watson* v. *Buckley, Osborne, Garrett & Co., Ltd., and Wyrovoys Products, Ltd.*, footnote 11, *supra*; *Dodd and Dodd* v. *Wilson and McWilliam*, [1946] 2 All E.R. 691 (K.B.); *Stewart* v. *Reavell's Garage*, [1952] 2 Q.B. 545; *Young & Marten Ltd.* v. *McManus Childs Ltd.*, [1969] 1 A.C. 454, [1968] 2 All E.R. 1169 (H.L.).

[113]The English courts were prepared to find warranties in bailment cases almost as early as in sales cases, and liability was imposed on that basis in early cases for injuries: *Fowler* v. *Lock* (1872), L.R. 7 C.P. 272 (unsuitable horse); *Hyman* v. *Nye & Sons* (1881), 6 Q.B.D. 685 (carriage with a defective bolt); *Mowbray* v. *Merryweather*, [1895] 1 Q.B. 857 (C.A.) (defective chain supplied to unload a ship). Also *Reed* v. *Dean*, [1949] 1 K.B. 188. And in the following hire-purchase agreements: *Felston Tile Co. Ltd.* v. *Winget, Ltd.*, [1936] 3 All E.R. 473 (C.A.); *Yeoman Credit Ltd.* v. *Apps*, [1962] 2 Q.B. 508, [1961] 2 All E.R. 281 (C.A.); *Astley Industrial Trust, Ltd.* v. *Grimley*, [1963] 2 All E.R. 33 (C.A.).

[114]There is an implied warranty in the sale of an unfinished house that it will be properly built: *Interjeet Riar et al.* v. *Bowgray Investments Ltd.* (1977), 1 R.P.R. 46 (Ont. C.A.); *Miller* v. *Cannon Hill Estates, Ltd.*, [1931] 2 K.B. 113.

has also been held that, in certain circumstances, an occupier of premises warrants that the premises are as fit as reasonable skill and care can make them. This is a standard of liability stricter than that of reasonable care, in that the occupier may be held liable for the negligence of another person for whom he would not ordinarily be responsible.[115] Although not all these examples relate to liability for defective products, they are all instances of cases in which the courts have, in effect, used warranty theory to impose what amounts to strict liability, or, at any rate, stricter liability than would be achieved by the application of negligence principles.

### 4. Breach of Statute

In modern times many products that are defective may be manufactured or distributed in breach of some statutory rule or regulation. Often, in Canada, the statute breached will be a federal statute such as the *Hazardous Products Act,*[116] the *Motor Vehicle Safety Act*[117] or the *Food and Drugs Act.*[118] There have been some suggestions that civil liability may be imposed for breach of such statutes, even though the defendant could not otherwise be shown to have been negligent.[119] However, Canadian courts have not shown themselves particularly eager to adopt this analysis, partly because of constitutional difficulties.[120]

### 5. Misleading Statements

Earlier, we briefly discussed the development of the law of warranties. In this section, we consider the contractual and tortious remedies that a person who relies on a false statement may have: namely, fraud, negligence and breach of warranty.

Damage may be caused, not by a defect in the product itself, but by

---

[115] *Pajot* v. *Commonwealth Holiday Inns of Canada Ltd.* (1978), 20 O.R. (2d) 76 (H.C.J.); *Brown and Brown* v. *B. & F. Theatres Ltd.*, [1947] S.C.R. 486, [1947] 3 D.L.R. 593; *Carriss* v. *Buxton*, [1958] S.C.R. 441, (1958), 13 D.L.R. (2d) 689; *Finigan* v. *City of Calgary and Heritage Park Society* (1967), 62 W.W.R. 115, 65 D.L.R. (2d) 626 (Alta. S.C., App. Div.); *Beaudry* v. *Fort Cumberland Hotel Ltd.* (1971), 3 N.S.R. (2d) 1, 24 D.L.R. (3d) 80 (S.C., App. Div.); *Carmichael* v. *Mayo Lumber Co. Ltd.* (1978), 85 D.L.R. (3d) 538 (B.C.S.C.): *Francis* v. *Cockrell* (1870), L.R. 5 Q.B. 501 (Ex. Ch.); *Searle* v. *Laverick* (1874), L.R. 9 Q.B. 122; *Hyman* v. *Nye & Sons,* footnote 113, *supra*; *Maclenan* v. *Segar,* [1917] 2 K.B. 325; *Silverman* v. *Imperial London Hotels Ltd.* (1927), 43 T.L.R. 260 (K.B.); *Cox* v. *Coulson,* [1916] 2 K.B. 177. See also, Fleming, footnote 17, *supra*, at pp. 432 ff., especially pp. 438-40.

[116] R.S.C. 1970, c. H-3.

[117] R.S.C. 1970, c. 26 (1st Supp.).

[118] R.S.C. 1970, c. F-27.

[119] *Sterling Trusts Corporation* v. *Postma and Little*, [1965] S.C.R. 324, (1964), 48 D.L.R. (2d) 423 is the leading Canadian case on the subject. Various views were canvassed, but the majority opinion appears to be that the effect of the breach of statute is to impose "*prima facie*" liability. See Linden, footnote 66, *supra*, at p. 120: "The formula — *prima facie* liability — is useful, but the meaning of this phrase is shadowy. It is clear that the Supreme Court did not envision an absolute duty, but it is not clear what kind of conduct and proof the court will consider an acceptable justification." See also Linden, *Canadian Tort Law* (1977), ch. 7, especially pp. 210-16. Compare, *Curll et al.* v. *Robin Hood Multifoods Ltd. et al.* (1974), 56 D.L.R. (3d) 129 (N.S.S.C., T.D.).

[120] See Hogg, *Constitutional Law of Canada* (1977), at pp. 273-75 and 288-89. For a recent case in which the power of the federal government to provide a civil remedy was questioned, see *MacDonald et al.* v. *Vapor Canada Ltd. et al.* (1976), 66 D.L.R. (3d) 1 (S.C.C.).

something said about the product. For example, a wire cable perfectly capable of lifting a one-half ton weight may become very dangerous if it is inaccurately described as capable of supporting two tons. If the cable is accompanied by the misleading description, it would be possible to classify the cable and its descriptive material, taken as a whole, as a "defective" product. The misleading statement and the product may, however, come from separate sources. For example, the product may come from a retailer and the descriptive material may come from a manufacturer. In this kind of situation, it is difficult to describe the product as "defective". The real complaint is that the statement is misleading.

Where the statement is fraudulent and there has been reliance on it, the maker will be liable for damages caused by this reliance. Such damages may include damages for personal injuries, for property damage and for consequential economic loss.[121] Where the statement is negligent, the law is not so clear. Several cases have imposed liability for negligent statements causing physical damage.[122] Liability has also been imposed in a number of cases for negligent statements causing economic loss.[123]

Where there is a contract between the parties, the interrelationship of the tortious and contractual remedies cannot be stated with complete certainty. In *Esso Petroleum Co. Ltd.* v. *Mardon,*[124] an oil company induced a prospective tenant to take a lease of a gasoline station by making a misleading statement about the volume of business that the proposed filling station could expect to secure. The oil company had carelessly omitted to revise the estimate in the light of a very important change in the design of the layout of the filling station. This change had the effect of preventing direct access to the station from the main street. The English Court of Appeal held that the oil company was liable to the tenant both in contract, for breach of warranty, and in tort, for negligent misrepresentation. On the warranty point, Lord Denning, M.R., said:[125]

> In the present case it seems to me that there was a warranty that the forecast was sound, that is, Esso made it with reasonable care and skill. That warranty was broken. Most negligently Esso made a 'fatal error' in the forecast they stated to Mr. Mardon, and on which he took the tenancy. For this they are liable in damages.

On the negligent misrepresentation point, Lord Denning, M.R., made the following statement:[126]

---

[121] *Langridge* v. *Levy* (1837), 2 M. & W. 519, aff'd (1838), 4 M. & W. 337 (Ex. Ch.) (personal injuries); *Mullett* v. *Mason* (1866), L.R. 1 C.P. 559 (property damage). See also *Graham* v. *Saville*, [1945] O.R. 301, [1945] 2 D.L.R. 489 (C.A.); *Burrows* v. *Rhodes and Jameson,* [1899] 1 Q.B. 816; *Doyle* v. *Olby (Ironmongers) Ltd. et al.*, [1969] 2 Q.B. 158 (C.A.); *Nicholls* v. *Taylor*, [1939] V.L.R. 119 (S.C.).

[122] *Robson* v. *Chrysler Corp. of Canada Ltd.* (1962), 32 D.L.R. (2d) 49 (Alta. S.C., App. Div.); *Clayton* v. *Woodman & Son (Builders) Ltd.*, [1962] 2 Q.B. 533 (C.A.), leave to appeal refused [1962] 1 W.L.R. 920 (H.L.); *Clay* v. *A. J. Crump & Sons Ltd.*, [1964] 1 Q.B. 533 (C.A.).

[123] *Sodd Corp. Inc.* v. *Tessis* (1977), 17 O.R. (2d) 158 (C.A.); *Dodds and Dodds* v. *Millman* (1964), 45 D.L.R. (2d) 472 (B.C.S.C.); *Bango* v. *Holt et al.* (1971), 21 D.L.R. (3d) 66 (B.C.S.C.); *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*, [1964] A.C. 465 (H.L.); *Esso Petroleum Co. Ltd.* v. *Mardon*, [1976] Q.B. 801 (C.A.).

[124] [1976] Q.B. 801 (C.A.).

[125] *Ibid.*, at p. 818.

[126] *Ibid.*, at p. 820.

> [I]f a man who has or professes to have special knowledge or skill makes a representation by virtue thereof to another — be it advice, information or opinion — with the intention of inducing him to enter into a contract with him, he is under a duty to use reasonable care to see that the representation is correct, and that the advice, information or opinion is reliable. If he negligently gives unsound advice or misleading information or expresses an erroneous opinion, and thereby induces the other side to enter into a contract with him, he is liable in damages . . . .
>
> . . . Applying this principle, it is plain that Esso professed to have — and did in fact have — special knowledge or skill in estimating the throughput of a filling station. They made the representation — they forecast a throughput of 200,000 gallons — intending to induce Mr. Mardon to enter into a tenancy on the faith of it. They made it negligently. It was a 'fatal error'. And thereby induced Mr. Mardon to enter into a contract of tenancy that was disastrous to him. For this misrepresentation they are liable in damages.

In *J. Nunes Diamonds Ltd.* v. *Dominion Electric Protection Company,*[127] the Supreme Court of Canada suggested that, where the relationship between the parties was governed by a contract, no action could be brought for negligent misstatement, unless it were an "independent tort".[128] The scope of the dictum is unclear. The Court itself said that it did not apply to a statement inducing a contract. The case involved a valid exemption clause, and it remains to be seen whether the scope of the dictum is to be limited to such a situation.

As the above-quoted statement from *Esso Petroleum Co. Ltd.* v. *Mardon* makes clear, an action for a misleading statement can often be based on warranty. Just as implied warranties provided a means of imposing strict liability for defective goods, so express warranties have the similar effect of imposing strict liability for misleading statements. If, in the example referred to above, the manufacturer of the wire cable is held liable for breach of a warranty that the cable will support two tons, he will be so liable whether or not he was negligent. Some cases have imposed liability on a warranty basis both between directly contracting parties and between parties not in obvious privity of contract, in the latter case by construing a "collateral contract".[129] No general principle of liability has, however, evolved. Accordingly, the law of warranties remains in a state of considerable uncertainty.

### 6. Summary

The two most significant branches of products liability law are undoubtedly negligence and implied warranties. When these two branches of

---

[127][1972] S.C.R. 769. In this case, the plaintiff had contracted with the defendant for a burglar alarm system. After its installation, the plaintiff requested that the system be examined. The defendant had the system inspected and represented to the plaintiff that it was functioning properly. Subsequently, a break-in occurred and a quantity of diamonds was stolen from the plaintiff's premises. The plaintiff sued the defendant in both contract and tort for the loss resulting from the failure of the burglar alarm system. The plaintiff failed to succeed on either basis.

[128]*Ibid.*, at pp. 777-78.

[129]*Supra*, at pp. 22-23 and see footnote 84, *supra*.

law are considered together, it will be seen that strict liability, or something very close to it, exists in large measure in present Anglo-Canadian law, although with significant gaps. On the negligence side, the manufacturer who has put into circulation a defective product that causes injury to the plaintiff will, it seems, very rarely escape liability. Although the legal theory is negligence, the practical effect appears to be very close to strict liability. Other business distributors of goods, such as importers, wholesalers and retailers, cannot so easily be held liable for negligence. The retail seller will, however, be strictly liable to the buyer for breach of the implied warranties for loss caused by defects. While in the case of the retailer, the legal theory is breach of promise, no actual promise is required. The effect is, therefore, strict liability. Further, where the retail seller is sued, wholesalers, importers and other distributors in the chain can be made indirectly liable by a series of warranty claims, but the process may be interrupted by insolvency or exemption clauses. As strict liability for breach of warranty is subject to the rule of privity of contract, each buyer must claim against his immediate seller; that is, strict liability in this context only applies when the plaintiff and defendant are in a contractual relationship with each other. It can fairly be said, then, looking at the two branches of the law together, that every business distributor of products is subject, in practice, to a large measure of strict liability. Where an express statement has been made, strict liability has been imposed in some cases by such devices as collateral contracts. Where the statement can be shown to be negligent, liability has been imposed on the basis of negligence. But there are significant gaps in the protection afforded to plaintiffs that have caused serious anomalies. These anomalies must be addressed if the law of products liability is to be placed on a fair and rational footing.

## CHAPTER 3

# DEFICIENCIES IN THE PRESENT LAW: THE CASE FOR REFORM

The case for reform of the law of products liability does not rest on the assertion that there is a large number of cases in which persons injured by defective products wrongly go uncompensated. As mentioned above, there is a large measure of strict liability already in the law. The case for reform is, rather, that the present law contains serious anomalies. If anomalies and irrationalities in the structure of the law cause injustice in even a comparatively small number of cases, there is an argument for reforming the law and putting it on a more rational basis.

The two chief anomalies spring from the contractual principles upon which the law of implied warranties is based. First, because of contractual theories, only a buyer can sue for breach of implied warranty. The law is in a similar position to that which prevailed twenty years ago in the United States when, as Prosser said,[1] a woman who buys and eats poisonous food cannot recover in contract from the seller, where she buys as her husband's agent; but, if she dies, her husband can recover for the loss of her services. The anomalies may be illustrated by reference to a number of more recent cases. It should be borne in mind that in the following discussion of these cases we make no reference to any possible remedy in negligence.

In *Buckley* v. *Lever Bros. Ltd.*,[2] the plaintiff recovered for injury to her eye caused by the shattering of a plastic clothespin that she had bought from the defendant. If, however, her husband, or her child, or a neighbour, had been similarly injured by one of the clothespins, they would have had no contractual right to recover against Lever Brothers. The case of *McMorran* v. *Dominion Stores Ltd. et al.*[3] concerned a bottle of soda water, the cap of which flew off when it was being opened by the buyer. The buyer recovered damages from the grocery store that sold him this bottle for injuries so caused to his eye. Again, if a neighbour or a member of the buyer's family had been opening the bottle, neither would have been able to recover under the implied warranties from the defendant. Moreover, if Mr. McMorran had been injured in the same way in the store, before completing his purchase, he would again have been without remedy against the defendant retailer.[4] The right to recover in contract for injuries caused by an exploding bottle will be determined, therefore, by the side of the cash

---

[1]Prosser, "The Assault Upon the Citadel (Strict Liability to the Consumer)" (1959-60), 69 Yale L.J. 1099, at p. 1118.

[2][1953] O.R. 704, [1953] 4 D.L.R. 16 (H.C.J.).

[3](1977), 14 O.R. (2d) 559, 74 D.L.R. (3d) 186 (H.C.J.).

[4]On somewhat similar facts, the defendant in *Hart* v. *Dominion Stores Ltd. et al.*, [1968] 1 O.R. 775, (1968), 67 D.L.R. (2d) 675 (H.C.J.) was able to defend successfully a claim in negligence. See also *Pharmaceutical Society of Great Britain* v. *Boots Cash Chemists (Southern) Ltd.*, [1952] 2 Q.B. 795, affirmed [1953] 1 Q.B. 401 (C.A.).

register upon which the injury occurs. One shopper, injured while lining up at the cash register, will have no action in contract. Another, injured while carrying the purchase from the cash register toward the door, may successfully seek compensation. Distinctions like this are not, in our view, rationally tenable. Surely, no rational person who is not a lawyer could be persuaded that, in respect of the liability of the store to compensate the plaintiff for his injuries, it should be a relevant question to ask on which side of the cash desk a shopper was standing. Another recent Canadian case provides a further illustration. In *Sigurdson et al.* v. *Hillcrest Service Ltd. and Acklands Ltd. (Third Party),*[5] the plaintiff had contracted with the defendant for the installation of a brake hose in his automobile. The brake hose proved, without the defendant's fault, to be defective, and the plaintiff and members of his family, who were all injured in the consequent collision, sued the defendant. The plaintiff recovered damages because he had a contract with the defendant. The other members of his family failed to recover. It is difficult to believe that such distinctions can be rationally supported.

It may be argued that in circumstances like those of the unsuccessful plaintiffs or hypothetical plaintiffs mentioned in the last paragraph, an injured party would have a remedy in negligence against the manufacturer of the defective goods. Indeed, this may often be so. Moreover, as we have noted, manufacturers, in the narrow sense of the term, are subject, in practice, to a large measure of strict liability. There will be, however, no effective remedy against the manufacturer where the manufacturer is unknown, insolvent, or beyond the jurisdiction.[6] These possibilities arise, if not commonly, at least sufficiently often to be significant. As a result, the right to recover against the retail seller is an important legal right, and important legal rights should not be made to turn on factors that are rationally irrelevant; that is, the existence of privity of contract. It is worth repeating that under a negligence rule wholesalers, retailers and importers will rarely be found liable.

The second anomaly that springs from contractual principles is that strict liability, based on breach of the implied warranties, is available only against the retailer and not the manufacturer. Yet, the retailer is usually an innocent distributor of the defective goods, while the manufacturer is generally the party who is primarily responsible for the defect. Thus, if the plaintiff in the *Lever Bros. Ltd.* case had brought an action against the manufacturer of the clothespins, she, like any other person injured by the goods, would have had to show negligence. The burden of this task, as has been shown, may be reduced by a presumption or inference of negligence against the manufacturer.[7] Nevertheless, there have been occasional cases in which a manufacturer has escaped liability on the ground of the plaintiff's failure

---

[5][1977] 1 W.W.R. 740, (1976), 73 D.L.R. (3d) 132 (Sask. Q.B.). It should be noted that in this case action was only taken against the party responsible for installing the defective brake hose. No action was commenced against the manufacturer of the defective brake hose, although the defendant did assert a third party claim in contract against the intermediate supplier of the defective product.

[6]See *supra*, ch. 1, footnote 3.

[7]*Supra*, at pp. 17-18; *McMorran* v. *Dominion Stores Ltd. et al.*, footnote 3, *supra*; *Hill* v. *James Crowe (Cases) Ltd.*, [1978] 1 All E.R. 812 (Q.B.).

to prove negligence.[8] In addition, the plaintiff who seeks recovery in negligence for injuries caused by a defective product faces other problems, including tactical disadvantages, and when suit is brought against the wholesaler, importer and retailer, the difficult hurdle of showing negligence.[9] It is also possible that the defect in the product might be the result of a defective part incorporated into the product by some other person for whom the manufacturer may not be responsible in law.[10] If a legal system is to choose one standard of liability for the manufacturer of a defective product, who is primarily responsible for the defect, and another standard of liability for the innocent retailer, who simply passes on a product with a not reasonably discoverable defect, it would seem rational to impose the heavier burden on the manufacturer. But our legal system has done precisely the opposite. It is the retailer who carries the burden of strict liability. Against the manufacturer, negligence must be shown.

The anomalies mentioned above seem more striking when it is borne in mind that the large majority of jurisdictions in the United States have now adopted a principle of strict liability. This position has been reached largely because of the American courts' refusal to tolerate these anomalies.[11] Thus, the American manufacturer who distributes goods in Canada finds himself more favourably treated here than at home. In view of the very close trading relationship between the United States and Canada, and in view of the very large number of consumer goods manufactured in the United States and sold in Canada, the disparity in levels of liability seems strange. When one adds the fact that the law in many western European countries is also moving toward strict liability, and that the English and Scottish Law Commissions and the Pearson Commission in the United Kingdom have recommended strict liability for personal injuries caused by defective products,[12] the case for a similar reform in Canada must appear very strong.

It might possibly be argued that the anomalies referred to above spring from an erroneous extension of the law of implied warranties in the nineteenth century.[13] The anomalies, it might be said, could be removed in another way than by adoption of strict liability; that is, by abolition of strict liability for breach of warranty, and the substitution of a universal regime of negligence. On that view, the retail seller would not be liable to the buyer or to anyone else unless he were negligent. But the adoption of this view

---

[8] *Willis* v. *Coca-Cola Co. of Canada Ltd.*, [1934] 1 W.W.R. 145, [1934] 2 D.L.R. 173 (B.C.C.A.). See also *Daniels and Daniels* v. *R. White & Sons, Ltd. and Tarbard,* [1938] 4 All E.R. 258 (K.B.). As noted above, ch. 2, footnote 52, this case has been criticized.

[9] *Supra*, at p. 19.

[10] *Supra*, at p. 19.

[11] It is now widely accepted in the U.S. that the explanation of these anomalies is that the obligation imposed by the implied warranties is not really a promissory obligation at all, and thus promissory principles cannot rationally be applied to limit the scope of liability. See Prosser, "The Fall of the Citadel (Strict Liability to the Consumer)" (1965-66), 50 Minn. L. Rev. 791. There are two lines of attack on the problem. One attempts to protect the injured party by giving him an extended contractual right, and the other attacks the problem directly as a matter of strict tortious liability. See *infra*, at pp. 51-56 ff.

[12] Law Com. No. 82 (Scot. Law Com. No. 45), *Liability for Defective Products* (1977); *Royal Commission on Civil Liability and Compensation for Personal Injury* (1978) (Cmnd. 7054).

[13] On the early history of warranties, see Waddams, "Strict Liability, Warranties, and the Sale of Goods" (1969), 19 U.T.L.J. 157.

would amount to a retrenchment from the principles of consumer protection developed by the courts since the nineteenth century. Further, it would be a move in a direction contrary to that taken by the legal systems most closely associated with our own. Moreover, the position of the retailer held liable for breach of warranty should not be viewed in isolation. Where the manufacturer or other person supplying the retailer is known, solvent and within the jurisdiction, the retailer who is held liable to the purchaser, in the absence of an agreement to the contrary, will generally be able to recover from his supplier, and indirectly from the manufacturer, for breach of warranty in the sale to the retailer.[14] The real question is: who should take the risk of the manufacturer's not being available as a source of compensation? As between the innocent consumer-buyer and the innocent business-retailer, the courts have held, in effect, that it is the retailer who should take the risk. This view, justifiable in the nineteenth century, seems even more persuasive today, when large retailing chains are common, and when it may often be the retailer rather than the manufacturer who is primarily responsible for the distribution and marketing of the goods. It would seem, therefore, to be a retrogressive step to attempt now to cut back on those elements of strict liability that have found a place in our legal system. The alternative is to extend them, by openly adopting and administering on a rational basis a system of strict liability.

---

[14] *Kasler and Cohen* v. *Slavouski*, [1928] 1 K.B. 78 (involving four successive indemnities of the retailer's liability to a purchaser who had contracted dermatitis); *Biggin & Co. Ltd.* v. *Permanite Ltd. et al.*, [1951] 2 K.B. 314 (C.A.).

# PART III

# LEGAL DEVELOPMENTS IN ONTARIO AND OTHER JURISDICTIONS

## CHAPTER 4

# CONSUMER PROTECTION DEVELOPMENTS

Consumer protection legislation of one kind or another has been enacted or proposed in various jurisdictions. We now turn to a brief survey of this activity.

### 1. Saskatchewan Consumer Products Warranties Act, 1977

In 1977, Saskatchewan enacted *The Consumer Products Warranties Act, 1977*.[1] This Act was based on the 1972 Report of the Ontario Law Reform Commission on *Consumer Warranties and Guarantees in the Sale of Goods*.[2] The Saskatchewan legislation enacts certain non-excludable statutory warranties that apply in all consumer sales.[3] These include warranties of acceptable quality,[4] reasonable fitness for the buyer's purpose,[5] and a warranty of durability.[6] An action for breach of the warranties may be brought not only against the retail seller, but also against the manufacturer.[7] The term manufacturer is defined to include any person who attaches his brand name to consumer products, any person who describes himself or holds himself out to the public as the manufacturer, and any person who imports products where the manufacturer does not have a regular place of business in Canada.[8] Section 5 of this Act provides as follows:

> 5. A person who may reasonably be expected to use, consume or be affected by a consumer product and who suffers personal injury as a result of a breach, by a retail seller or manufacturer, of a statutory warranty mentioned in paragraphs 3, 4, 5 and 6 of section 11 shall be entitled to the remedies mentioned in section 27.[9]

Section 27 provides:

> 27. A person mentioned in Section 5 shall, as against the retail seller or manufacturer, be entitled to recover damages arising from personal injuries that he has suffered and that were reasonably foreseeable as liable to result from the breach.

---

[1]S.S. 1976-77, c. 15. For a general discussion of this legislation, see Romero, "The Consumer Products Warranties Act" (1978-79), 43 (Vol. 2) Sask. L. Rev. 81.

[2]Ontario Law Reform Commission, *Report on Consumer Warranties and Guarantees in the Sale of Goods* (1972).

[3]Footnote 1, *supra*, s. 11.

[4]*Ibid.*, s. 11.4.

[5]*Ibid.*, s. 11.5.

[6]*Ibid.*, s. 11.7.

[7]*Ibid.*, s. 13(3).

[8]*Ibid.*, s. 2(*h*).

[9]Paragraphs 3, 4, 5 and 6 of section 11, referred to in section 5 of the Act, correspond to the warranties of description, acceptable quality, reasonable fitness for purpose and sample.

These sections are restricted to claims for personal injuries. In relation to such claims, however, the effect of these sections is greatly to extend the strict liability of distributors of goods, and to resolve the most striking anomalies mentioned above. This enactment brings the law of Saskatchewan very close to adopting a general rule of strict liability. In many of the examples given above, where an injured plaintiff might fail to recover under Ontario law because of the absence of a contract or the inability to establish negligence,[10] he would succeed under the present law of Saskatchewan. Nevertheless, there are a few respects in which the Saskatchewan Act falls short of a general rule of strict liability.

First, the Act only applies to consumer products, defined as goods ordinarily used for personal, family, or household purposes, or for agricultural or fishing purposes.[11] This restriction sets up a distinction that may well be justifiable where the consumer's complaint is of deficient value. The distinction does not, however, appear to be acceptable in the case of personal injuries. A coin-operated dryer, manufactured for use in a coin laundry, for instance, is probably not a "consumer product" within the statutory definition. But if a user is injured by a faulty electrical connection in such a dryer, should he not be entitled to compensation? Again, the statutory warranties only apply where a consumer product "is sold by a retail seller". A retail seller is defined as a person who sells consumer products to consumers in the ordinary course of his business.[12] The person injured by the coin-operated dryer would also be excluded on this ground. So too would the pedestrian injured by the failure of defective brakes on a truck owned and operated by a business user. Also excluded would be the shopper injured in a supermarket before purchase of a defective product. In none of these cases is the product "sold by a retail seller". These restrictions seem anomalous, for where personal injuries are in question, it does not seem relevant to ask either whether the defective product is a consumer product or whether it has been sold by a retail seller. The rights of the injured plaintiff to recover damages are restricted by reference to a transaction that appears irrelevant to the question of compensation for such injuries.

There are some other aspects, though they cannot be described as anomalies, in which the Saskatchewan Act falls short of a general rule of strict liability such as that applied in most American jurisdictions by the judicial adoption of section 402A of the *Restatement (Second) of Torts.*[13] Section 402A imposes liability on any business seller of goods. The Saskatchewan Act is restricted to certain classes of business distributor, and does not include, for example, the wholesaler, except in certain circumstances.[14] Nor would, for example, a business lessor always be

---

[10] *Supra*, at pp. 33-36.

[11] *The Consumer Products Warranties Act, 1977.* S.S. 1976-77, c. 15, s. 2(*e*).

[12] *Ibid.*, s. 2 (*l*).

[13] American Law Institute, *Restatement (Second) of Torts* (1965), Appendix 1966. See *infra*, at pp. 54-55.

[14] Footnote 11, *supra*, s. 2(*h*): A wholesaler can be liable under the definition of "manufacturer" if he i) attaches a brand name to a product, ii) holds himself out to the public as the manufacturer of consumer products, or iii) imports or distributes products of foreign manufacture. He may also be liable if he attaches a warranty to the goods.

included.[15] Again, the extended liability applies only to personal injuries; unlike section 402A, the Saskatchewan Act does not apply to property damage, nor to purely economic loss. These questions will be considered in more detail below.[16]

One further comment can be made on the Saskatchewan legislation. In respect of express statements, section 8(1) provides:

> 8.(1) Any promise, representation, affirmation of fact or expression of opinion or any action that reasonably can be interpreted by a consumer as a promise or affirmation relating to a sale or to the quality, quantity, condition, performance or efficacy of a consumer product or relating to its use or maintenance, made verbally or in writing directly to a consumer or through advertising by a retail seller or manufacturer, or his agent or employee who has actual, ostensible or usual authority to act on his behalf, shall be deemed to be an express warranty if it would usually induce a reasonable consumer to buy the product, whether or not the consumer actually relies on the warranty.

The majority of the provisions of the Saskatchewan Act were proclaimed in force in November, 1977, but these provisions did not include section 8(1). If proclaimed in its present form, the effect of this provision will be to make manufacturers and retailers strictly liable for loss caused by reliance on statements made to promote the sale of products. Indeed, it will go further by dispensing with proof of actual reliance by the plaintiff, if the statement would tend to induce such reliance in consumers generally.[17]

### 2. New Brunswick Consumer Protection Project Report, 1976, and the Consumer Product Warranty and Liability Act, 1978

The *Third Report of the Consumer Protection Project*, 1976, of the Law Reform Division of the New Brunswick Department of Justice recommended as follows:[18]

> Privity of Contract
>
> 4. The doctrine of privity of contract should be abolished in consumer transactions. In the case of contracts for the sale or supply of consumer goods a supplier's guarantee, whether the supplier be manufacturer, wholesaler, retailer or other business distributor, and whether the guarantee be express or implied, should apply in favour of all persons who may reasonably be expected to buy, consume, use, or be affected by the goods. Such persons should be able to recover from the supplier any loss that is caused by his breach of the guarantee, whether the loss be economic or damage to person

---

[15]Under s. 2(*m*), the definition of "sale" includes a contract of lease or hire, but is restricted to transfers of property "in a consumer product to a consumer".

[16]*Infra*, at pp. 79-85.

[17]See also Ontario Law Reform Commission, *Report on Sale of Goods* (1979), at pp. 135-42, especially at p. 139, and Draft Bill, s. 5.10.

[18]New Brunswick Dept. of Justice, Law Reform Division, *Third Report of the Consumer Protection Project* (1976), Vol. 1, at pp. 4-7.

or property, provided that such loss is not suffered in a business capacity, and subject to the normal rules as to causation and remoteness. For this purpose, a loss should not be treated as being suffered in a business capacity if it represents liability for a loss that is not suffered in a business capacity.

Safety-Related Defects

5. (a) A person who in the course of business supplies any consumer goods that are unreasonably dangerous to person or property because of a defect in design, materials or workmanship, should be liable to any person who may reasonably be expected to buy, use, consume or be affected by the goods and who suffers loss because of such goods, whether the loss be economic loss or damage to person or property, provided that such loss is not suffered in a business capacity, and subject to the normal rules as to causation and remoteness. For this purpose, a loss should not be treated as being suffered in a business capacity if it represents liability for a loss that is not suffered in a business capacity.

(b) No person should be liable under this provision for any loss that arises from a defect that was not present in the goods at the time he supplied them or, subject to applicable New Brunswick and Federal safety standards, for any loss that arises from a defect that he has pointed out to the person to whom he supplied the goods before the loss was suffered.

(c) The liability under this provision should not depend on contract.

(d) The liability under this provision should not depend on negligence but should be a strict liability.

(e) No person should be allowed to contract out of the liability imposed by this provision.

Legislation has now been enacted to give effect to these proposals. The main part of the *Consumer Product Warranty and Liability Act, 1978,*[19] provides non-excludable warranties in sales of consumer products, and extends a remedy for breach to any person suffering a non-business loss. Section 27 of this Act goes further. It creates a direct strict liability for the supply of dangerously defective products. The section is entitled "Product Liability" and provides as follows:

27.(1) A supplier of a consumer product that is unreasonably dangerous to person or property because of a defect in design, materials or workmanship is liable to any person who suffers a consumer loss in the Province because of the defect, if the loss was reasonably foreseeable at the time of his supply as liable to result from the defect and

---

[19]S.N.B. 1978, c. C-18.1. The Act, however, has not yet been proclaimed in force.

*(a)* he has supplied the consumer product in the Province;

*(b)* he has supplied the consumer product outside the Province but has done something in the Province that contributes to the consumer loss suffered in the Province; or

*(c)* he has supplied the consumer product outside the Province but the defect arose in whole or in part because of his failure to comply with any mandatory federal standards in relation to health or safety, or the defect caused the consumer product to fail to comply with any such standards.

(2) For the purposes of paragraph (1)*(b)*, where a person has done anything in the Province to further the supply of any consumer product that is similar in kind to the consumer product that caused the loss, it shall be presumed that he has done something in the Province that contributed to the consumer loss suffered in the Province, unless he proves irrefragably that what he did in the Province did not in any way contribute to that loss.

(3) A person is not liable under this section

*(a)* for any loss that is caused by a defect that is not present in the consumer product at the time he supplies it; or

*(b)* for any loss that is caused by a defect that he has reason to believe exists and that he discloses to the person to whom he supplies the consumer product before the loss is suffered, if the defect does not arise in whole or in part because of his failure to comply with any mandatory federal or provincial standards in relation to health or safety and the defect does not cause the consumer product to fail to comply with any such standards.

(4) The liability of a person under this section does not depend on any contract or negligence.

"Consumer loss" and "consumer product" are defined in section 1(1) of the Act as follows:

'consumer loss' means

*(a)* a loss that a person does not suffer in a business capacity; or

*(b)* a loss that a person suffers in a business capacity to the extent that it consists of liability that he or another person incurs for a loss that is not suffered in a business capacity;

'consumer product' means any tangible personal property, new or used, of a kind that is commonly used for personal, family or household purposes.

Section 27 and the definitions set out above go considerably beyond the provisions of the Saskatchewan Act. It will be noted that they apply to all business suppliers of products, including wholesalers, and that they cover some non-business property damage and economic losses as well as

personal injury. Further, in the case of safety related defects, no contract at all is necessary. However, like the Saskatchewan provisions, these provisions seem to be restricted to consumer goods. Thus, to revert to our earlier examples, the user injured by a defective coin laundry appliance, or a pedestrian injured by a defective truck owned and operated by a business user would seem to be without protection. Similarly, a shopper injured by a defective plate glass window, or a defective display shelving unit (not being of a type ordinarily used by consumers) would be without a remedy under these provisions.

### 3. The Ontario Law Reform Commission Report on Consumer Warranties and Guarantees in The Sale of Goods, 1972

The source of the Saskatchewan Act, and of much thinking in the area in Canada and elsewhere, is the 1972 Report of the Ontario Law Reform Commission on *Consumer Warranties and Guarantees in the Sale of Goods.*[20] The Report recommended that there should be certain non-excludable warranties in consumer sales, and that for breach of those warranties, the "consumer buyer" should have an action against the "manufacturer". "Consumer buyer" was defined to include any person deriving an interest in the goods from or through the original consumer purchaser,[21] and "manufacturer" was defined to include the importer or assembler of the goods or anyone holding himself out as the manufacturer.[22] This proposal goes a considerable distance in the direction of strict liability. However, it does not entirely remove the anomalies of the present law.

First, under this proposal, liability would only extend in favour of those having "an interest" in the goods. Thus, in the *Sigurdson* case, considered above,[23] the car owner would have a remedy against the supplier of the brake hose and against the manufacturer, but the other occupants of the car would not. They would derive no interest in the goods from or through the original consumer purchaser and, therefore, would not be consumer buyers. Nor would a bystander, such as a pedestrian, have any such right of action. This Commission itself recognized this anomaly and stated as follows:[24]

> We are conscious of this anomaly. It suggests to us the need for an early review of the general tort law governing a manufacturer's responsibility for defective goods.

Secondly, like the Saskatchewan Act, the proposal would only apply where the goods had been the subject of a consumer sale. Thus, the person injured by an exploding bottle in a supermarket would not be entitled to recover since there would not, at the time of his injury, have been any consumer sale. Finally, the proposal applies only to particular classes of supplier, that is, retail sellers and manufacturers, as defined.

---

[20]Ontario Law Reform Commission, *Report on Consumer Warranties and Guarantees in the Sale of Goods* (1972).

[21]*Ibid.*, at p. 160.

[22]*Ibid.*, at pp. 159-60.

[23]*Supra*, at p. 34.

[24]Footnote 20, *supra*, at p. 71.

It does not include other business sellers such as wholesalers, nor does it include business suppliers other than sellers.

In relation to express statements, the Report recommended an extended definition of express warranty so as to impose strict liability upon manufacturers, as defined, and upon retailers.[25] The effect of these recommendations would be that any false statements made in the course of distributing a product would, in general, be actionable.

### 4. The Ontario Consumer Products Warranties Bill, 1976

The Consumer Products Warranties Bill (Bill 110) was introduced into the Ontario Legislature in 1976, but did not proceed beyond first reading.[26] This Bill adopted some of the recommendations contained in the 1972 *Report on Consumer Warranties and Guarantees in the Sale of Goods* of the Ontario Law Reform Commission. However, in respect of liability for injuries caused by defective products, it fell short of the recommendations made by the Commission. Apart from the points mentioned above, (that is to say, the restrictions on the classes of person liable and the classes of person protected, and on the type of transaction involved), the Bill contained two further important restrictions. First, it excluded all products sold to the consumer at a price less than $25.00. Secondly, it did not apply to food, drink, medicine, cosmetics, or clothing. These restrictions may be comprehensible in relation to economic loss claimed by consumers, but they seem inappropriate where the complaint is of injuries caused by defective products. One has only to think of the leading cases on products liability to realize that many of them involve items of small value, such as plastic clothespins,[27] sling-shots,[28] items of food,[29] drink,[30] medicine,[31] cosmetics,[32] and clothing.[33] The Bill may have dealt adequately with the economic expectations of consumers disappointed with the quality of goods they received, but it would have done very little to resolve the anomalies in the law of products liability. Presumably, however, this was not the thrust of the Bill.

In relation to express statements, the Bill would have considerably extended liability. Express warranty was defined in section 1(1)(*c*) to mean

---

[25] *Ibid.*, at pp. 66 and 151.

[26] 3rd Session, 30th Legislature (1976).

[27] *Buckley* v. *Lever Bros. Ltd.*, [1953] O.R. 704, [1953] 4 D.L.R. 16 (H.C.J.).

[28] *Godley* v. *Perry*, [1960] 1 W.L.R. 9, [1960] 1 All E.R. 36 (Q.B.).

[29] *Barnett* v. *H. & J. Packer & Co., Ltd.*, [1940] 3 All E.R. 575 (K.B.); *Kirby* v. *Burke and Holloway*, [1944] I.R. 207 (H.C.J.); *Tarling* v. *Nobel*, [1966] A.L.R. 189 (Aus. Cap. Terr. S.C.).

[30] *Donoghue* v. *Stevenson*, [1932] A.C. 562 (H.L.)(Scot.); see also *Shandloff* v. *City Dairy Ltd. and Moscoe*, [1936] O.R. 579, [1936] 4 D.L.R. 712 (C.A.); *Zeppa* v. *Coca-Cola Ltd.*, [1955] O.R. 855, [1955] 5 D.L.R. 187 (C.A.); *Varga* v. *John Labatt Ltd. et al.*, [1956] O.R. 1007, (1956), 6 D.L.R. (2d) 336 (H.C.J.).

[31] *O'Fallon* v. *Inecto Rapid (Canada) Ltd. et al.* (1938), 53 B.C.R. 266, [1939] 1 W.W.R. 264, [1939] 1 D.L.R. 805 (S.C.); *Abbott-Smith* v. *Governors of University of Toronto et al.* (1964), 49 M.P.R. 329, 45 D.L.R. (2d) 672 (N.S.S.C., App. Div.); *Distillers Co. (Biochemicals) Ltd.* v. *Thompson*, [1971] A.C. 458 (P.C.).

[32] *O'Fallon* v. *Inecto Rapid (Canada) Ltd. et al.*, footnote 31, *supra*; *Watson* v. *Buckley, Osborne, Garrett & Co., Ltd., and Wyrovoys Products, Ltd.*, [1940] 1 All E.R. 174 (K.B.).

[33] *Grant* v. *Australian Knitting Mills Ltd.*, [1936] A.C. 85 (P.C.).

"an affirmation of fact or promise relating to the quality, condition, quantity, performance or efficacy of a consumer product or relating to its use and maintenance where the tendency of such affirmation is to induce the buyer to purchase the consumer product". Section 7 provided that an express warranty made by a retail seller in connection with the sale of a consumer product to a retail buyer, if made in writing or published or broadcast, enured to the benefit not only of the buyer but of any person subsequently entitled to possess and use the product.

5. Quebec Consumer Protection Act, 1978

Quebec's *Consumer Protection Act*[34] imposes statutory obligations on the manufacturer and retail seller of goods, including an obligation that the goods must be serviceable for a reasonable length of time. A "consumer" is defined in section 1(*e*) as a natural person except a merchant, and a "manufacturer" is defined in section 1(*g*) to include an importer and a person who puts his trademark on goods, where the manufacturer has no establishment in Canada, and a person who represents himself to the public as a manufacturer of goods.

Section 53 of the Act provides as follows:

> 53. Le consommateur qui a contracté avec un commerçant a le droit d'exercer directement contre le commerçant ou contre le manufacturier un recours fondé sur un vice caché du bien qui a fait l'objet du contrat, sauf si le consommateur pouvait déceler ce vice par un examen ordinaire.
>
> Il en est ainsi pour le défaut d'indications nécessaires à la protection de l'utilisateur contre un risque ou un danger dont il ne pouvait lui-même se rendre compte.
>
> Ni le commerçant, ni le manufacturier ne peuvent alléguer le fait qu'ils ignoraient ce vice ou ce défaut.
>
> Le recours contre le manufacturier peut être exercé par un consommateur acquéreur subséquent du bien.
>
> [53. A consumer who has entered into a contract with a merchant is entitled to exercise directly against the merchant or the manufacturer a recourse based on a latent defect in the goods forming the object of the contract, unless the consumer could have discovered the defect by an ordinary examination.
>
> The same rule applies where there is a lack of instructions necessary for the protection of the user against a risk or danger of which he would otherwise be unaware.
>
> The merchant or the manufacturer shall not plead that he was unaware of the defect or lack of instructions.

---

[34]Assemblée Nationale de Québec, Bill 72, 3rd Session, 31st Legislature (1978). Bill 72 received third reading on December 21, 1978 and Royal Assent on December 22, 1978. The Act, however, has not yet been proclaimed in force.

The rights of action against the manufacturer may be exercised by any consumer who is a subsequent purchaser of the goods.]

The effect is, therefore, to make the manufacturer liable for any breach of the statutory warranty against latent defects. Accordingly, as would be the case both under the proposals of the Ontario Law Reform Commission in its *Report on Consumer Warranties and Guarantees in the Sale of Goods* and under the Saskatchewan Act, a manufacturer, under the terms of the Act, is strictly liable for latent defects in goods sold to consumers. Moreover, as in the case of the Commission's 1972 proposals, the right of action provided by the Quebec Act would be extended to subsequent purchasers. The Act differs, however, from the proposals of the Ontario Law Reform Commission in that it does not go so far as to protect a person deriving an interest in goods otherwise than by purchase, such as a donee or bailee. Nor does it go so far as the even more extensive Saskatchewan provisions, which provide protection for all who are likely to be affected by the use of a product. Nor, of course, as far as the New Brunswick provisions, which openly adopt tortious liability.

### 6. Agricultural Machinery Legislation

For many years the prairie provinces, and most recently Prince Edward Island, have had legislation making the manufacturer of agricultural machinery, as well as the dealer, liable for breach of statutory warranties, including provision of spare parts.[35] This legislation was considered to be an important precedent by the Ontario Law Reform Commission in its 1972 Report.

### 7. Trade Practices Legislation

Three Canadian provinces have adopted trade practices legislation that has the effect, broadly speaking, of making actionable any misrepresentation of the quality of goods sold to a consumer.[36] The Alberta Act has a specific reference to misrepresentations concerning defects in goods.[37] The scope of these statutes is limited by the concept of unfair business practice. In order to succeed, it seems that the plaintiff must show a misrepresentation or, at least, that the defendant knew or ought to have known of the defect.

### 8. Safety Standards Legislation

A number of federal statutes deal with product standards. These include the following: the *Consumer Packaging and Labelling Act*;[38] the *Hazardous Products Act*;[39] the *Motor Vehicle Safety Act*;[40] the *National*

---

[35]*The Farm Implement Act*, R.S.A. 1970, c. 136; *The Agricultural Implements Act, 1968*, S.S. 1968, c. 1; *The Farm Machinery and Equipment Act*, S.M. 1971, c. 83; *The Farm Implement Act*, R.S.P.E.I. 1974, c. F-3.

[36]Alta.: *The Unfair Trade Practices Act*, S.A. 1975, c. 33, *The Unfair Trade Practices Amendment Act, 1976*, S.A. 1976, c. 54; B.C.: *Trade Practices Act*, S.B.C. 1974, c. 96; Ont.: *The Business Practices Act, 1974*, S.O. 1974, c. 131.

[37]*The Unfair Trade Practices Act*, S.A. 1975, c. 33, s. 4(c) and (d).

[38]S.C. 1970-71-72, c. 41.

[39]R.S.C. 1970, c. H-3.

[40]R.S.C. 1970, c. 26 (1st Supp.).

*Trade Mark and True Labelling Act*;[41] the *Precious Metals Marking Act*;[42] the *Textile Labelling Act*;[43] the *Food and Drugs Act*;[44] and, the *Explosives Act*.[45] These Acts impose penal sanctions for violations of their provisions, and include administrative and regulatory mechanisms for preventing defective products from reaching the consumer. However, it appears uncertain whether an action for compensation lies simply for breach of some statutory standard,[46] although violation of a statutory standard might be *prima facie* evidence of negligence, or evidence of a breach of warranty under *The Sale of Goods Act*.[47] On occasion, however, particularly in the United States and England,[48] breach of statute has, of itself, been held to give rise to a cause of action. In some cases, this technique has been used by courts to impose strict liability for defects.[49]

On the other hand, civil liability is directly addressed in the Saskatchewan *Consumer Products Warranties Act, 1977* which provides as follows:

> 34.(1) In any action arising under this Act, proof that a consumer product does not comply with mandatory health or safety standards set under an Act of the Parliament of Canada or an Act of the Legislature or with quality standards set by regulation constitutes *prima facie* evidence that the consumer product is not of acceptable quality or fit for the purpose for which it was bought.
>
> (2) No proof that a consumer product complies with the standards mentioned in subsection (1) shall constitute *prima facie* evidence that the consumer product is of acceptable quality or fit for the purpose for which it was bought.

This section makes a breach of statute *prima facie* evidence of a defect. It adopts a similar, but more limited, approach to that contained in the *Third Report of the Consumer Protection Project* of New Brunswick referred to above. This Report recommended:[50]

> 7. A person who in the course of business breaches any Federal consumer protection legislation or regulations should be liable to any person who suffers loss because of that breach, whether the loss be economic loss or damage to person or property, provided that such loss is not suffered in a business capacity, and subject to the normal rules as to causation and remoteness. For this purpose a loss should not be treated as being suffered in a business capacity if it

---

[41]R.S.C. 1970, c. N-16.
[42]R.S.C. 1970, c. P-19.
[43]R.S.C. 1970, c. 46 (1st Supp.).
[44]R.S.C. 1970, c. F-27.
[45]R.S.C. 1970, c. E-15.
[46]See *supra*, ch. 2, footnote 119, at p. 28.
[47]R.S.O. 1970, c. 421.
[48]See Fleming, *The Law of Torts* (5th ed., 1977), at pp. 122-33 and Armitage and Dias (eds.), *Clerk and Lindsell on Torts* (14th ed., 1975), at pp. 908-21.
[49]For a discussion of these cases, see Ballway, "Products Liability Based Upon Violation of Statutory Standards" (1965-66), 64 Mich. L. Rev. 1388.
[50]Footnote 18, *supra*, at p. 10.

represents liability for a loss that is not suffered in a business capacity.

The Report pointed out that the effect of such a provision on extra-provincial Canadian suppliers could be to impose liability even though any tort created by this Report might be committed in another province and might not be actionable by the law of that province. Under the conflict of laws rules generally accepted in Canada, conduct is actionable in a jurisdiction if actionable by the *lex fori* and not justifiable by the *lex loci delicti*.[51] "Not justifiable" has been held to include conduct that is criminally punishable, although not civilly actionable.[52] The New Brunswick *Consumer Warranty and Liability Act, 1978* provides in section 27(1)*(c)* that a manufacturer who supplies a product outside the Province is liable for defects caused by noncompliance with federal statutory standards.

The relationship between breach of statute and civil liability has never been satisfactorily resolved. Statutory standards for products have been increasing in rigour and complexity in recent years. It seems clear that statutory standards are necessary to keep unsafe products off the market: prevention of injury is certainly preferable to compensation after its occurrence. But, however thorough and detailed statutory regulation of products may become, there will always be a certain number of defective products that will continue to cause accidents. A fair and rational system of compensation is, therefore, essential.

### 9. Australian Statutes

The 1972 Report of the Ontario Law Reform Commission appears to have had considerable influence in Australia. The New South Wales *Commercial Transactions (Miscellaneous Provisions) Act, 1974,*[53] the New South Wales *Motor Dealers Act, 1974,*[54] the South Australia *Manufacturers Warranties Act, 1974,*[55] and the Australian Capital Territories *Law Reform (Manufacturers Warranties) Ordinance, 1977,*[56] all show the influence of our 1972 Report. The last two statutes have the effect of making the manufacturer directly liable for breach of statutory warranties, including warranties of merchantable quality, fitness for purpose, and availability of spare parts and service facilities.

---

[51] *Phillips* v. *Eyre* (1869), L.R. 4 Q.B. 225, affirmed (1870), L.R. 6 Q.B. 1 (Ex. Ch.).
[52] *Machado* v. *Fontes,* [1897] 2 Q.B. 231 (C.A.). See *infra,* at pp. 113-14.
[53] 1974, No. 105.
[54] 1974, No. 52. See also New South Wales Law Reform Commission, *Working Paper on the Sale of Goods* (1975).
[55] 1975, No. 47.
[56] 1977, No. 12.

## CHAPTER 5

# GENERAL DEVELOPMENTS IN PRODUCTS LIABILITY

### 1. American Developments

#### (a) Strict liability for defective products

Forty years ago, the law in American jurisdictions was much the same as the present law in Ontario. On the basis of theories of negligence and implied warranties, a large measure of strict liability had, in practice, been introduced, but this introduction carried with it the restrictions referred to above that stemmed from the contractual basis of the implied warranties.[1] The American experience reveals that there have been two lines of development in the law of products liability. One has been to increase the protection given to the injured party by a theory of extended contractual rights under the original contract of sale. The other, and more direct approach, has been to recognize that compensation of injured persons belongs to the province of the law of torts rather than to that of the law of contracts and, consequentially, to create direct tortious liability. The latter approach has prevailed since 1965.[2]

The extended contractual right is embodied in section 2-318 of the American *Uniform Commercial Code*.[3] This section provides as follows:

> §2-318. Third Party Beneficiaries of Warranties Express or Implied
>
> Alternative A
>
> A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.
>
> Alternative B
>
> A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.
>
> Alternative C
>
> A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be

---

[1] *Supra,* at pp. 33-36.
[2] American Law Institute, *Restatement (Second) of Torts* (1965), Appendix 1966, s. 402A.
[3] American Law Institute, *Uniform Commercial Code,* 1972 Official Text with Comments.

> affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends. As amended 1966.[4]

The provision now designated Alternative A was originally the only official version of section 2-318. It proved highly unsatisfactory in practice, mainly because it set up distinctions as anomalous as those it had attempted to abolish.[5] For example, a member of a buyer's family was protected, but a stranger was not. Consequently, should a neighbour be injured by a defective product loaned to him, he would not be able to claim the protection of the section; but if the product were lent to the buyer's aunt, even though she did not live with the buyer, the section might apply.[6] Again, a guest in the buyer's home would be protected, but a guest in the buyer's automobile would not.

---

[4]The Official Comment to this section provides as follows:

> Purposes:
>
> 1. The last sentence of this section does not mean that a seller is precluded from excluding or disclaiming a warranty which might otherwise arise in connection with the sale provided such exclusion or modification is permitted by Section 2-316. Nor does that sentence preclude the seller from limiting the remedies of his own buyer and of any beneficiaries, in any manner provided in Sections 2-718 or 2-719. To the extent that the contract of sale contains provisions under which warranties are excluded or modified, or remedies for breach are limited, such provisions are equally operative against beneficiaries of warranties under this section. What this last sentence forbids is exclusion of liability by the seller to the persons to whom the warranties which he has made to his buyer would extend under this section.
>
> 2. The purpose of this section is to give certain beneficiaries the benefit of the same warranty which the buyer received in the contract of sale, thereby freeing any such beneficiaries from any technical rules as to "privity." It seeks to accomplish this purpose without any derogation of any right or remedy resting on negligence. It rests primarily upon the merchant-seller's warranty under this Article that the goods sold are merchantable and fit for the ordinary purposes for which such goods are used rather than the warranty of fitness for a particular purpose. Implicit in the section is that any beneficiary of a warranty may bring a direct action for breach of warranty against the seller whose warranty extends to him [As amended in 1966].
>
> 3. The first alternative expressly includes as beneficiaries within its provisions the family, household and guests of the purchaser. Beyond this, the section in this form is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain. The second alternative is designed for states where the case law has already developed further and for those that desire to expand the class of beneficiaries. The third alternative goes further, following the trend of modern decisions as indicated by Restatement of Torts 2d §402A (Tentative Draft No. 10, 1965) in extending the rule beyond injuries to the person [As amended in 1966].

[5]The difficulties of attempting to apply the section are vividly illustrated by a series of Pennsylvania decisions which led to the eventual adoption of the principle of strict liability in tort: *Hochgertel* v. *Canada Dry Corporation*, 409 Pa. 610, 187 A. 2d 575 (1963); *Miller* v. *Preitz,* 422 Pa. 383, 221 A. 2d 320 (1966); *Webb* v. *Zern,* 422 Pa. 424, 220 A. 2d 853 (1966); *Kassab* v. *Central Soya,* 432 Pa. 217, 246 A. 2d 848 (1968).

[6]The conclusion that the restrictive terms of Alternative A are untenable is borne out by the cases that have attempted to apply the section. In *Hochgertel* v. *Canada Dry Corporation,* footnote 5, *supra,* a bartender injured by the explosion of a bottle was denied recovery because he was an employee of the buyer, not a member of his family or a guest in his home. In *Miller* v. *Preitz,* footnote 5, *supra,* a child injured by boiling water from a vaporizer was permitted to recover, but only because the vaporizer had been bought by the child's aunt, who happened to live next door.

Alternative A, the original official version, has another limitation. By implication, it seems to be restricted to retail sellers and inapplicable to manufacturers or other distributors of goods, for it is only the buyer from the retail seller whose family or guest would ordinarily come into contact with the goods. Accordingly, that version does nothing to solve the anomaly referred to earlier, whereby the retail seller is subjected to a strict liability from which the manufacturer is exempt.[7] Twenty states varied or omitted the section,[8] and in most others it has now been rendered obsolete by the judicial adoption of the principles of strict liability in tort contained in the *Restatement (Second) of Torts*.[9] Alternative A, therefore, never actually represented the law in any American jurisdiction for any substantial period of time. Variation or omission of sections, of course, was at odds with the basic purpose of uniformity under the *Uniform Commercial Code,* and, in a belated attempt to salvage some uniformity, Alternatives B and C were promulgated in 1966.

It should be noted that there are two respects in which the contractual right contained in all the versions of section 2-318 falls short of a direct tortious duty. All the versions of the section extend only to sellers.[10] Thus, the business distribution of goods by lease, or by distribution of free samples, would not seem to be covered. Nor, in respect of the retailer's liability, would the section protect a supermarket shopper injured by an exploding bottle before his sale is consummated. Secondly, the injured person only has the benefit of such warranty as may have been given to the buyer. It should be noted that the prohibition in section 2-318 against exclusion or limitation of the operation of the section does not prevent exclusion or modification of the warranty itself, which might otherwise arise in connection with the sale.[11] As a result, the remedies of the person injured by a defective product may turn on an agreement between the defendant and his immediate buyer, an agreement to which the injured person was not a party, and of which he may know nothing. An exclusion of warranties in respect of economic loss in a carefully negotiated agreement between a sophisticated business seller and a sophisticated business buyer may well be enforceable, and rightly so, between the parties to the

---

[7]*Supra*, at pp. 34-35.

[8]See CCH *Products Liability Reports,* para. 1230. The following states have omitted the section: California (Cal. Laws 1963, Ch. 819); Utah (Utah Code Ann. 70A-2-318 1965). Other states have varied the section: States which have enacted that the seller's warranty shall extend to any person who may reasonably be expected to use, consume or be affected by the goods: Alabama (Ala. Code Title 7As. 2-318); Colorado (Colo. R.S. s. 155-2-318); Delaware (D.C.A., Title 5As. 2-318); Hawaii (R.S. s. 490:2-318); Maryland (Maryland Anno. Code 49 s. 2-318); Minnesota (Stats. Sec. 336. 2-318); N. Dakota (Cen. Code s. 41-02-35); S. Carolina (Code 1976 s. 36. 2-318); S. Dakota (Comp. Laws 1967, s. 57-4-41); Vermont (9A V.S.A. s. 2-318); Wyoming (Stats. 1957, s. 34-2-318). States that provide that lack of privity is no defence to an action against seller or manufacturer: Arkansas (Ark. Stats. Anno. s. 85-2-318.1); Georgia (Ga. Code s. 105-106); Maine (11 M.R. S.A. s. 2-318); Massachusetts (Laws 1973, Ch. 750, Am. Ch. 106 s. 2-318); Virginia (Code of 1950, s. 8.2-318). Official comment expressing neutrality: Connecticut (42a-2-318 1961). Expressly leaving whole question to courts: Texas (Bus. and Com. Code s. 2-318). Specially as to food and drink — warranty should extend from manufacturer or seller or packer to persons described in s. 2-318: Rhode Island (G.L. 1956, s. 6A-2-318).

[9]Footnote 2, *supra.*

[10]Footnote 4, *supra.* See Official Comment, Purposes: No. 3.

[11]*Ibid.* Official Comment, Purposes: No. 1.

agreement.[12] It is another thing altogether to say that such an exclusion of warranties in a business transaction should be able to remove the rights of a third person suffering personal injury caused by defects in the goods.[13]

Largely because of these difficulties, the majority of American jurisdictions[14] have now turned toward a direct strict liability in tort. In this context, the watershed was provided by a decision of the New Jersey Supreme Court in 1960.[15] The theory of warranty liability developed in this case was, in effect, equivalent to a strict liability in tort. The step to open acceptance of strict liability was a comparatively short one, and, largely due to the influence of the late Dean Prosser,[16] that step was taken by the American Law Institute in 1965 by its adoption of section 402A of the *Restatement (Second) of Torts.*

This section provides:

> §402A. Special Liability of Seller of Product for Physical Harm to User or Consumer
>
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Although the section has not been enacted in any American jurisdiction,

---

[12]In its recent *Report on Sale of Goods* (1979), the Commission recommended that, in the non-consumer context, it should be possible to exclude the implied warranties, subject to the doctrine of unconscionability. An exclusion or limitation of damages for breach of warranty for injury to the person is, however, deemed to be *prima facie* unconscionable: *Report on Sale of Goods* (1979), ch. 9, at pp. 227 ff., and see Draft Bill, s. 5.16.

[13]In a proposal put forth by the Commission for the purpose of discussion in its 1979 *Report on Sale of Goods,* a buyer would have a right of action not only against a retail seller, but also against a manufacturer or other person in the distributive chain. This right of action, based on contract, would be derivative in that the buyer would be bound by the terms of any agreement between, for example, the manufacturer and retailer, including any agreement excluding the implied warranties, subject to the doctrine of unconscionability. As noted in footnote 12, *supra,* an exclusion of liability for injury to the person is , however, deemed to be *prima facie* unconscionable: *Report on Sale of Goods* (1979), ch. 10, and see Draft Bill, s. 5.18.

[14]CCH *Products Liability Reports,* para. 4070.

[15]*Henningsen* v. *Bloomfield Motors Inc.,* 32 N.J. 358, 161 A. 2d 69 (1960).

[16]Prosser, "The Fall of the Citadel (Strict Liability to the Consumer)" (1965-66), 50 Minn. L. Rev. 791.

its principle has been judicially adopted in most jurisdictions. Section 402A, however, may be unduly restrictive in two respects.

First, the language of this section would appear to be restricted to a "seller", a restriction that is difficult to justify. In fact, however, the cases have extended the principle to include business bailors,[17] distributors of free samples,[18] vendors of real property,[19] and suppliers of goods on a free trial basis.[20] In effect, therefore, the word "seller" has been interpreted to mean "supplier" or "distributor" in the widest sense.

Secondly, the section applies only to a "user or consumer". Thus, the driver of a defective car would be protected. According to a comment to the section,[21] the section would cover the passenger in the car, who could be considered to be a user in an extended sense. However, a pedestrian injured by a car, because of brake failure, would not be protected under the terms of section 402A. Prosser attempted to justify the distinction between users and consumers, on the one hand, and bystanders on the other.[22] His argument was not, however, as convincing as most of his writings in this area and this distinction was quickly abandoned in several jurisdictions.[23] There seems to be much to be said for the view of the Supreme Court of California that the "public policy which protects the driver and passenger of the car should also protect the bystander".[24] The principle has, therefore, been extended to cover not only users and consumers, but any person within the principles of proximity and causation injured by the defective product.

It may be noted that section 402A extends only to physical harm, that is, damage to person and property, including consequential economic loss, but excluding pure economic loss. The American cases remain divided on this point. Whether recovery should extend to pure economic loss is an important and controversial issue, and one to which we will return later in this Report.[25]

### (b) RECENT STATUTORY RESTRICTIONS

In recent years, a number of states have passed legislation which

---

[17] *Cintrone* v. *Hertz Truck Leasing & Rental Service,* 45 N.J. 434, 212 A. 2d 769 (1965).

[18] *McKisson* v. *Sales Affiliates, Inc.,* 416 S.W. 2d 787 (1967).

[19] *Schipper* v. *Levitt & Sons, Inc.,* 44 N.J. 70, 207 A. 2d 314 (1965).

[20] *Delaney* v. *Towmotor Corporation,* 339 F. 2d 4 (1964); *Barth et al.* v. *B. F. Goodrich Tire Co.*, 265 C.A. 2d 228, 71 Cal. Rptr. 306 (1968).

[21] Footnote 2, *supra*, at p. 354, Comment l: *User or Consumer.*

[22] Footnote 16, *supra*, at p. 819.

[23] Michigan: *Piercefield* v. *Remington Arms Company, Inc.,* 375 Mich. 85, 133 N.W. 2d 129 (1965); Ohio: *Lonzrick* v. *Republic Steel Corporation,* 6 O.S. 2d 227, 218 N.E. 2d 185 (1966); Indiana: *Sillis* v. *Massey-Ferguson, Inc.,* 296 F. Supp. 776 (1969); Connecticut: *Mitchell* v. *Miller*, 26 C.S. 142, 214 A. 2d 694 (1965); New York: *Forgione* v. *New York*, CCH *Products Liability Reports,* para. 5194 (N.Y. Ct. Claims, 1963) (But a New York Court in *Berzon* v. *Don Allen Motors, Inc.*, 23 App. Div. 2d 530, 256 N.Y.S. 2d 643 (1965) held that the extension of liability, in an accident caused by a defective car, to include bystanders was too radical a step). Texas: *Darryl* v. *Ford Motor Co.,* 440 S.W. 2d 630 (1969); California: *Elmore* v. *American Motors Corporation,* 70 Cal. 2d 578, 75 Cal. Rptr. 652, 451 P. 2d 84 (1969).

[24] *Elmore* v. *American Motors Corporation,* footnote 23, *supra,* 451 P. 2d, at p. 89.

[25] *Infra,* at pp. 83-85 ff.

has the effect of restricting in some way the principle of strict liability. Reduced limitation periods and cut-off periods for products liability claims, for example, have been introduced in a great many states. As a result of this legislative activity at the state level, confusion and uncertainty on the part of consumers, users and suppliers about their respective legal rights and obligations has been engendered. In order to inject uniformity and, therefore, greater certainty into the law of products liability, the United States Department of Commerce in the past year has put forth for discussion purposes a Draft Uniform Product Liability Act.[26] As the preamble to the Act states:[27]

> This Act sets forth uniform standards for state product liability tort law. It does not cover all issues that may be litigated in product liability cases; rather, it focuses on those where the need for uniform rules is the greatest.

Among the matters addressed in the proposed Act are the "state of the art" defence, compliance with legislative and administrative standards, limitation and cut-off periods, and contributory negligence.

(c) EXPRESS STATEMENTS

In the case of express statements, as in the case of simple distribution of defective products discussed above, the *Restatement (Second) of Torts* adopted, in section 402B, a principle designed to bring together the tort and the warranties sides of the law within a single principle of strict liability in tort.

This section provides:

> §402B. Misrepresentation by Seller of Chattels to Consumer
>
> One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though
>
> (a) it is not made fraudulently or negligently, and
>
> (b) the consumer has not bought the chattel from or entered into any contractual relation with the seller.

This provision avoids most of the problems inherent in a contractual analysis. Thus, for example, the plaintiff himself need not rely on the statement.[28] There are, however, a number of difficulties with the section, some of which may be briefly mentioned. There seems no sound reason to distinguish between those who are engaged in the "business of selling" products and those who distribute them in other ways in the course of a business; for example, business lessors or business bailors.[29] Further, the

---

[26]See U.S. Dept. of Commerce, Draft Uniform Product Liability Law, 44 Fed. Reg. 2996 (1979). See Appendix 2.

[27]*Ibid.*, at p. 2997. See ch. 6, footnote 44, *infra*, at p. 77.

[28]Footnote 2, *supra*, at p. 362, Comment j: *Justifiable Reliance.*

[29]*Supra*, at p. 55.

restriction of liability to "chattels", in the strict sense, does not seem to be justified,[30] and the limitation of the remedy to a "consumer" may give rise to difficulties.[31] In addition, there seems no reason why the principle should be confined to statements made to the public.[32] Indeed, reliance may be more intense when a misleading statement is made directly to an individual. We return to this subject later in the Report.[33]

## 2. European and Quebec Developments

A study of civil law jurisdictions reveals a close similarity between these various jurisdictions, not only in relation to their approaches to problems in the law of products liability, but also in relation to the solutions that they have adopted. Just as the common law approach has two strands, torts and warranties, so also most civil law systems have a corresponding division between the law of delict and the law of sales.[34] In French law, as in Anglo-Canadian law, fictions have been used to impose what is, in effect, strict liability. Again, as in our system of law, the fictions appear both on the delict side and on the sales side.

Our research indicates that there has been a remarkable convergence of different civil law systems toward strict liability. In Quebec, amendments have been proposed to the sections of the Civil Code on obligations which, if adopted, will have the effect of imposing strict liability on manufacturers and on certain distributors.[35] A proposed new section imposes liability on a manufacturer, and on any other person, who distributes a product under his name or as his own, "for the damage caused by a defect in the design, manufacture, preservation or presentation of the thing, unless the defect was apparent". The proposed section continues: "The same applies when the user is given no indication necessary to his protection concerning risks and dangers that he could not himself detect."[36] The Official Comment sums up the effect of the provision by saying "a

---

[30]In general, the distinction between chattels and certain kinds of real property, for example, cannot be supported. See, for example, *Dutton* v. *Bognor Regis Urban District Council,* [1972] 1 Q.B. 373 (C.A.), at p. 402, *per* Sachs, L.J.: "I can find nothing in principle which absolves from liability a builder who creates a hidden defect because he happens to be or to become the owner of the premises built. On the contrary, as Lord MacDermott himself said in *Gallagher's* case, [1961] N.I. 26, 41: '. . . the doctrine of *Donoghue* v. *Stevenson* can apply to defective houses as well as defective chattels, . . .': and in my judgment there is no exception behind which landowners as such can shelter." See *supra*, at p. 12.

[31]*Supra*, at pp. 33-34, 55.

[32]Statements were made to the individual plaintiffs in *Shanklin Pier Ltd.* v. *Detel Products Ltd.,* [1951] 2 K.B. 854, [1951] 2 All E.R. 471 and *Traders Finance Corporation* v. *Haley* (1966), 57 D.L.R. (2d) 15 (Alta. S.C., App. Div.), affirmed (*sub nom. Ford Motor Co. of Canada Ltd.* v. *Haley*) [1967] S.C.R. 437, (1967), 60 W.W.R. 497, 62 D.L.R. (2d) 329.

[33]*Infra,* at pp. 64-65.

[34]The law of delict is the civilian equivalent to the law of torts; the law of sales is comparable to the law in respect of warranties in the common law.

[35]Quebec Civil Code Revision Office, *Report on the Quebec Civil Code* (1977).

[36]*Ibid.*, Volume I, Draft Civil Code, Book Five: Obligations, s. 102:

> Le fabricant de la totalité ou d'une partie d'une chose mobilière, ainsi que toute autre personne qui en fait la distribution sous son nom ou comme étant sienne, répond du dommage causé par un vice de conception, de fabrication, de conservation ou de présentation de celle-ci, sauf si le vice était apparent.
>
> Il en va de même pour le défaut d'indications nécessaires à la protection de l'utilisateur contre des risques et dangers dont il ne pouvait lui-même se rendre compte.

manufacturer . . . has an obligation of warranty".[37] The provisions of the Quebec *Consumer Protection Act* have been discussed above.[38] Further comment on this Act seems unnecessary, save to add that it introduces strict liability.

The law of West Germany, France and several European countries has also been moving toward strict liability.[39] Furthermore, there are now two international documents, both proposing strict liability, albeit with certain restrictions. These are the Strasbourg Convention and the draft Directive of the European Economic Community (E.E.C.). We have attached these documents to our Report as Appendices 3 and 4 respectively. Each of these documents was studied in detail during the course of the Project, and the points of substance that constitute restrictions on a general principle of strict liability are discussed below.[40] For present purposes, it is sufficient to note that both documents propose a basic test of strict liability in preference to one based on negligence or fault. The English and Scottish Law Commissions in their 1977 Report on *Liability for Defective Products*,[41] discussed below, reviewed these documents and accepted this view in respect of personal injuries, as did the U.K. *Royal Commission on Civil Liability and Compensation for Personal Injuries.*[42]

The overall conclusion that we have derived from our study of civil law systems is, therefore, that in almost all industrialized jurisdictions having a close relationship with Ontario, there is movement toward the replacement of the principle of fault by a principle of strict liability for damage caused by defective products.

### 3. The English and Scottish Law Commissions' Report On Liability For Defective Products, 1977

There has been collaboration between the English and Scottish Law Commissions in relation to the law of products liability. These Law Commissions jointly have been considering the question of products liability since 1968. In that year, they published a Working Paper entitled *Provisional Proposals Relating to Amendments to Sections 12 - 15 of the Sale of Goods Act, 1893 and Contracting Out of the Conditions and Warranties Implied by those Sections.*[43] A substantial part of the paper was devoted to a consideration of the position of persons injured by defective goods who had no contractual relationship with the seller. The Law Commissions were very conscious of the anomalies, discussed above, which spring from the imposition of strict liability upon a retail seller in favour of his immediate buyer, and the failure to extend the same principle to defendants other than the retail seller and to plaintiffs other than the retail buyer.[44] The

---

[37]*Ibid.*, Volume II, Commentaries, at p. 623.

[38]*Supra*, at pp. 46-47.

[39]The literature includes *Product Liability in Europe* (1975), a collection of reports prepared under the auspices of the Association Européenne D'Etudes Juridiques et Fiscales.

[40]*Infra*, at pp. 79 ff.

[41]Law Com. No. 82 (Scot. Law Com. No. 45)(1977).

[42](1978) (Cmnd. 7054).

[43]Law Com. W.P. No. 18 (Joint Working Paper — Scottish Law Commission Memorandum No. 7) (1968).

[44]*Ibid.* See the examples given in para. 33, at p. 12.

Working Paper proposed that, in consumer sales, the benefit of the seller's warranty obligation should be extended to any person who might reasonably be expected to use, consume, or be affected by the goods,[45] a proposal based on Alternative C of section 2-318 of the American *Uniform Commercial Code*. This proposal was deferred by the Law Commissions in their 1969 final Report on this topic. The reason given was that further study was required, in particular, to consider the tortious as well as the contractual side of the law of products liability.[46] In 1975, the Law Commissions published another Working Paper entitled *Liability for Defective Products*.[47] In this Working Paper, they canvassed the various possibilities and problems of reform of the law of products liability, inviting comments but suggesting no firm conclusions. In 1977, the Law Commissions published their Report on *Liability for Defective Products*.[48]

In the 1977 Report, the Law Commissions considered the adequacy of existing rights and remedies in respect of injuries caused by defective products, from both the negligence and the warranties sides. They found these rights and remedies to be inadequate, largely because of the anomalies referred to above in our discussion of the existing law in Ontario.[49] The Law Commissions considered amending the law either by giving additional contractual rights and remedies or by reversing the onus of proof of negligence. They concluded, however, that the only satisfactory solution was an imposition of strict liability in tort. The Law Commissions' main recommendation, therefore, was that a principle of strict liability in tort be adopted for personal injuries caused by defective products.[50]

Liability under the English and Scottish Law Commissions' recommendations would fall on "producers" who put their products into circulation in the course of a business. It should be noted that retailers, generally speaking, would not be covered by the definition of the term "producer". "Producer" would include a manufacturer, a person who puts his name or trademark on a product, and a person who in the course of a business supplies a defective product that does not identify the manufacturer. This term would also include the first distributor of the defective product within the jurisdiction into which it had been imported.[51] In this respect, however, the Law Commissions' proposal does not go so far as section 402A of the American Restatement; it does not extend liability to business suppliers such as wholesalers and business lessors, let alone retailers. Moreover, the Law Commissions' recommendations apply only to personal injury and death; they do not apply to property damage or to pure economic loss.[52] The Law Commissions reviewed the Strasbourg Convention and the

---

[45]*Ibid.*, para. 37, at p. 14.

[46]Law Com. No. 24 (Scot. Law Com. No. 12), *Exemption Clauses in Contracts First Report: Amendments to the Sale of Goods Act 1893. Report by the Law Commission and the Scottish Law Commission* (1969), paras. 60-63, at pp. 22-23.

[47]Law Com. W.P. No. 64 (Joint Working Paper — Scottish Law Commission Memorandum No. 20) (1975).

[48]Footnote 41, *supra.*

[49]*Supra*, at pp. 33-36.

[50]Law Com. No. 82 (Scot Law Com. No. 45), *Liability for Defective Products* (1977), para. 125, at pp. 37-39.

[51]*Ibid.*, paras. 99-102, at pp. 29-30.

[52]*Ibid.*, para. 121, at pp. 35-36.

draft Directive of the E.E.C. on products liability and recommended the adoption of a rule of strict liability along the general lines of the Strasbourg Convention. The Law Commissions also considered the advisability of accession to these documents, but on this, and on certain other matters, there was a difference of opinion between the two Commissions.[53] In the result, the Law Commissions' main proposal was for a principle of strict liability in tort, to be imposed upon the business producer of products for personal injuries caused by defects in the products. Two aspects of this proposal merit further comment.

First, the English and Scottish Law Commissions recommended that existing rights and remedies should remain unaffected.[54] The effect of implementing the Commissions' proposals would be to superimpose on the existing structure of legal remedies a new statutory liability. A claim against a retailer or wholesaler, or a claim for property damage or economic loss, would still have to be determined under existing law. Secondly, the adoption of the Commissions' proposals would not provide a complete solution. In our earlier discussion of the present law of Ontario, two anomalies were identified. One was that an injured person who is not a buyer cannot sue the retail seller for breach of warranty. This is the problem sometimes conveniently referred to as "horizontal privity".[55] The other anomaly is that an injured person can, if he has a contract, assert strict liability against the retail seller, but not against the manufacturer who is generally the party primarily responsible. This problem is sometimes called that of "vertical privity".[56] The proposals of the English and Scottish Law Commissions would solve the second problem of "vertical privity" by imposing strict liability upon the manufacturer; that is, at least in respect of personal injuries. Because the Law Commissions' proposals focused on the liability of "producers", defined so as not to include retailers, their proposals do nothing to solve the first problem, that of "horizontal privity". The rule would remain that only the buyer has a right of action against the retailer.[57] The problem would become acute if the manufacturer were not amenable to suit, because he was unknown, insolvent, or beyond the jurisdiction. The Law Commissions have attempted, by their extended definition of "producer",[58] to alleviate the difficulties that may arise where the manufacturer is unknown or beyond the jurisdiction. But the problem of insolvency would remain. Moreover, even where there is a "producer" available to be sued and solvent, the injured person might still prefer to sue the retailer for breach of warranty. The anomaly would remain that the immediate buyer would have this election, but

---

[53]These differences will be discussed later in the Report.

[54]Footnote 50, *supra*, para. 44, at pp. 15-16.

[55]The "privity image" is of a diagram in which a manufacturer is indicated vertically above the retail seller; the retail buyer and any others who may be injured by the goods are indicated in a position horizontally opposite the retail seller. Thus any such injured person who is not the buyer has a problem of "horizontal privity" as against the retail seller.

[56]*Ibid.* In the same diagram, the injured plaintiff wishing to sue the manufacturer faces a problem of "vertical" or possibly "diagonal" privity. See Ezer, "The Impact of the Uniform Commercial Code on the California Law of Sales Warranties" (1960-61), 8 U.C.L.A. L. Rev. 281, at pp. 322 ff.; Pelster, "The Contractual Aspect of Consumer Protection: Recent Developments in the Law of Sales Warranties" (1966), 64 Mich. L. Rev. 1430, at pp. 1442-44.

[57]*Infra*, at p. 92.

[58]Footnote 51, *supra*.

that other persons injured would not. Despite these difficulties, however, there is no doubt that the Law Commissions' proposed rule is very close, in practical effect, to a general principle of strict liability for personal injuries, and is very close to the rule prevailing in most of the American jurisdictions.

### 4. Pearson Commission Report

In March, 1978, the long-awaited *Report of the Royal Commission on Civil Liability and Compensation for Personal Injuries*, generally known as the Pearson Commission Report,[59] was published in the United Kingdom. It had been widely thought that the Commission might recommend complete abolition of tort law in cases of accidental personal injuries, and the substitution of a state-run compensation scheme similar to that now existing in New Zealand.[60] In the event, however, the Commission recommended the retention of the tort system, but with a shift toward social security. Thus, the Report recommended a motor vehicle compensation scheme along the lines of the English industrial injuries legislation, a compensation scheme that would operate concurrently with tort liability.[61] Further, a supplementary benefit was proposed for severely handicapped children.[62]

The Pearson Commission gave special attention to products liability. It rejected the introduction of a "no-fault" compensation scheme for injuries caused by defective products. The Commission, instead, recommended the adoption of a rule of strict liability similar to the Strasbourg Convention and consistent with the recommendation of the Law Commissions.[63] Strict liability would be imposed on producers, including importers, of finished products, and on manufacturers of components. The Pearson Commission recommended no exceptions for any particular type of product, no special defences for development risks, and no financial limits on liability.[64] The Report thus adds one more influential voice to the recommendations calling for strict liability, at least in respect of personal injuries.

### 5. Possible Directions for Reform

#### (a) accident compensation schemes

One possible solution to the problem of personal injuries caused by defective products is the introduction of a comprehensive scheme of accident compensation. In the field of workmen's compensation, a statutory scheme now largely replaces the litigation system in Ontario as a means of compensating victims of work-related accidents. Some jurisdictions have enacted limited schemes for the compensation of victims of motor vehicle

---

[59] *Royal Commission on Civil Liability and Compensation for Personal Injury* (1978) (Cmnd. 7054).

[60] See discussion, *infra*, at p. 62.

[61] Footnote 59, *supra*, paras. 1004, 1068, at pp. 213, 226.

[62] *Ibid.*, para. 1531, at p. 319.

[63] *Ibid.*, para. 1236, at p. 263.

[64] *Ibid.*, Recommendations 133-53, at pp. 383-84.

accidents.[65] Indeed, this Commission in its *Report on Motor Vehicle Accident Compensation*[66] recommended the introduction of such a compensation scheme in Ontario. A comprehensive accident compensation scheme has been enacted in New Zealand.

The New Zealand *Accident Compensation Act 1972*[67] abolishes entirely litigation for injuries caused by accident. The law of products liability in New Zealand, therefore, has been superseded in respect of personal injuries.[68] A strong case can be made for such reform.[69] This case rests chiefly on the view that there are more efficient, rational and just methods of compensating those injured by accident than the present system of tort litigation. Once the main purpose of the system is seen as accident compensation, it is difficult to understand why a distinction should be drawn between the innocent victim of an accident who is fortunate enough to find somebody who can be made legally liable, and the accident victim who, similarly injured, cannot find anyone, or any solvent person, to be made liable. Subsidiary arguments in support of this case are that the present system is time-consuming and expensive; it uses up the time of courts, lawyers and expert witnesses, all to an end that could much more easily and directly be achieved by simply paying compensation. The variations in awards of damages lead to further anomalies, and to the unequal treatment of those in equal need.

A number of arguments have been advanced against the introduction of accident compensation schemes.[70] It sometimes is argued, for example, that compensation schemes are deficient, in that they generally place strict limits on the amounts recoverable for pain and suffering and the loss of amenities of life; that is, they eliminate the possibility that exists under the present common law system of large damage awards in cases of serious injuries. The advocates of a statutory compensation scheme argue, however, that depriving some persons of the possibility of large awards is a small price to pay for the assurance of a reasonable level of compensation to all who suffer injuries. Further, in light of the recent decisions of the Supreme Court of Canada[71] suggesting that, save in exceptional circumstances, damages for non-pecuniary loss ought not to exceed $100,000, the possibility of very large awards at common

---

[65]For discussion of some of the limited provincial schemes, see Linden, *Canadian Negligence Law* (1972), at pp. 455 ff. Quebec has recently enacted a comprehensive scheme for the compensation of victims of motor vehicle accidents: *Automobile Insurance Act*, S.Q. 1977, c. 68.

[66]Ontario Law Reform Commission (1973).

[67]*Accident Compensation Act 1972*, No. 43, as amended by the *Accident Compensation Amendment Act (No. 2) 1973*, No. 113.

[68]The scope of the Act was extended in 1973 to cover all persons suffering personal injury by accident. (The 1972 Act only applied to those injured in motor vehicle accidents, and "earners".)

[69]See, for example, Ison, *The Forensic Lottery* (1967) and Atiyah, *Accidents, Compensation and the Law* (2nd ed., 1975). See also Ison, "The Politics of Reform in Personal Injury Compensation" (1977), 27 U.T.L.J. 385.

[70]See, for example, Linden, "Faulty No-fault: A Critique of the Ontario Law Reform Commission Report on Motor Vehicle Accident Compensation" (1975), 13 O.H.L.J. 449; Linden, "Tort Law as Ombudsman" (1973), 51 Can. Bar Rev. 155.

[71]*Andrews et al.* v. *Grand & Toy Alberta Ltd. and Anderson*, [1978] 2 S.C.R. 229; *Thornton et al.* v. *School District No. 57 (Prince George) et al.*, [1978] 2 S.C.R. 267; *Arnold and Arnold* v. *Teno et al.*, [1978] 2 S.C.R. 287.

law has, for the most part, been eliminated.[72] To this extent, therefore, the argument against a statutory compensation scheme loses much of its force. Moreover, a considerable portion of an award in a case of serious injury is composed of medical expenses, which are already absorbed throughout Canada by provincial insurance schemes.

The consideration of a universal scheme of compensation for personal injuries is beyond the scope of this Report and, accordingly, we express no views on the matter. It should, however, be noted that nothing in this Report is intended to be inconsistent with the possible ultimate adoption of such a scheme.[73]

### (b) EXTENDED CONTRACTUAL RIGHTS

On several occasions, we have made reference to the anomalies presented by the restriction of strict liability for breach of warranty to the immediate buyer of the defective goods. A common reaction of commentators and, more generally, of legal systems themselves to these anomalies has been to consider the extension of the buyer's contractual rights against his retailer in favour of third parties. This is, as we have noted,[74] the technique adopted in section 2-318 of the American *Uniform Commercial Code* and in the revised Sale of Goods Act proposed by this Commission in its *Report on Sale of Goods*.[75] So too, it was the method by which the American courts extended the liability of the supplier, be he a retailer or manufacturer, a method that took them eventually to strict liability in tort.[76] This was also the technique originally proposed by the English and Scottish Law Commissions,[77] although abandoned in their final Report in favour of a tortious principle.[78] Similarly, this was the technique used in the Ontario Consumer Products Warranties Bill, 1976,[79] and now employed in the Saskatchewan *Consumer Products Warranties Act, 1977*.[80]

There are two aspects to the matter that merit comment, and they correspond to the two anomalies that we have mentioned earlier in our discussion of the existing law of Ontario.[81] The first is the extension

---

[72]In the recent case of *Lindal* v. *Lindal*, [1978] 4 W.W.R. 592 (B.C.S.C.), the British Columbia Supreme Court awarded $135,000 as damages for pain and suffering. It should be noted, however, that the Court in this case stated that it was adhering to the principles enunciated by the Supreme Court of Canada.

[73]It may be added that a compensation scheme is not inconsistent with enterprise liability. Costs of compensation caused by particular activities can, under a compensation scheme, be allocated to those activities. This can be either by way of an administrative levy on various classes of potential accident causers, for example, motorists, employers in certain industries, and manufacturers of certain products, or by way of subrogation. In a study of a compensation scheme, careful attention would have to be given to the comparative costs and benefits of such allocations.

[74]*Supra*, at pp. 51-54.

[75]The revised Sale of Goods Act proposes a derivative right for extended warranties. See Ontario Law Reform Commission, *Report on Sale of Goods* (1979), ch. 10, and see Draft Bill, s. 5.18.

[76]*Ibid.*

[77]Footnote 43, *supra*.

[78]Law Com. No. 82 (Scot. Law Com. No. 45), *Liability for Defective Products* (1977).

[79]Bill 110, 3rd Sess., 30th Legislature.

[80]S.S. 1976-77, c. 15.

[81]*Supra*, at pp. 33-36.

of the liability of the retail seller of the goods to persons other than the buyer, the problem known as "horizontal privity". The second aspect is the extension of liability from the retail seller to the manufacturer and other suppliers, the problem known as "vertical privity".[82] As we pointed out above, the original official version of section 2-318 of the *Uniform Commercial Code* dealt only with horizontal privity.[83] The alternative versions of section 2-318, and consumer warranty legislation in Canada,[84] extend liability to manufacturers and to certain other suppliers, but not to all business suppliers.

As we have mentioned, some consumer warranty statutes require the presence of a consumer sale before the statutory protection applies.[85] Further, any version of the theory of extended contractual rights requires, by definition, the existence of a contract of some sort, usually a contract of sale. Thus, the shopper injured in the supermarket by an exploding bottle would not, under any of these theories, have an action against the retailer in contract, though he might have an action against the manufacturer in negligence. The prospective buyer of an automobile, injured as a result of brake failure on a test drive, would be similarly situated. The principal difficulty with the theory of the extended contractual right is that it extends to the injured person only the benefit of such warranty as the defendant may have given to his immediate buyer. As was mentioned above, it does not seem satisfactory that, in the case of injury, the rights of the injured person should turn upon the provisions of a contract to which he was not a party, and of which, in all probability, he had no knowledge or means of knowledge.[86]

### (c) STRICT LIABILITY IN TORT

Our study of the law of products liability, and our review of possible solutions to the problem of liability, has led us to a clear conclusion. We are of the firm view that the most rational basis for dealing with the rights of a person injured by a defective product is to create a direct right of action, not dependent on contract, against the supplier of the defective product. This is the conclusion that has been reached by most of the American jurisdictions, the English and Scottish Law Commissions, the Pearson Commission, the Strasbourg Convention and the E.E.C. draft Directive,[87] and by the Quebec Draft Code and the New Brunswick Act. Accordingly, we recommend that Ontario should enact a principle of strict liability to the effect that a person who supplies a defective product that causes injury should be strictly liable in tort for damages. Our Draft Bill so provides.[88]

As we have earlier indicated, damage may be caused not only by a defect in a product but also by a false statement concerning a product.

---

[82]See footnotes 55 and 56, *supra*.

[83]*Supra*, at pp. 52-53.

[84]For a general discussion of the Canadian legislation, see *supra*, at pp. 39-49.

[85]See, for example, *The Consumer Products Warranties Act, 1977*, S.S. 1976-77, c. 15, s. 4. Compare, *Consumer Product Warranty and Liability Act, 1978*, S.N.B. 1978, c. C-18.1.

[86]*Supra*, at pp. 53-54.

[87]See Appendices 3 and 4.

[88]See Draft Bill, s. 3.

In some such cases, for example, inadequate labelling, it is reasonable to view the product and the statement, taken as a whole, as a defective product. However, this analysis will not be available where the making of the statement and the distribution of the product are separate. At the present time, a person injured as a result of his own or someone else's reliance upon a false statement concerning a product must rely on the vagaries of the existing contractual and tortious remedies.[89] In our view, a person so injured should be on the same legal footing as a person injured by a product that is itself defective. Accordingly, we recommend that a person who supplies a product and who makes a false statement[90] concerning the product, reliance upon which causes injury, should also be strictly liable in tort for the damages so caused, whether or not the reliance is that of the person injured.[91]

We do not, at this stage, discuss what we consider should be the limitations of the proposed principle of strict liability, nor the problems that we contemplate may arise in its formulation. We will return to a discussion of these very important matters later in this Report.

We wish, however, to emphasize that we do not recommend here the introduction in Ontario of an accident compensation scheme. Such schemes are commonly called "no-fault" schemes.[92] This term is apt to be confused with the principle of strict liability, but the two concepts are quite dissimilar. A "no-fault" accident compensation scheme typically requires proof only that an injury has occurred within the scope of the scheme, with payment according to a schedule to be made from an insurance fund. Strict liability, on the other hand, is a comparatively minor modification of the existing system. Although the plaintiff would be relieved from proving fault, he would still be required to prove the existence of a defect when the product left the supplier's hands, and that the defect has caused his injury. Individual responsibility would be retained for payment of damages according to the present system.

---

[89]See *supra*, at pp. 28-30.

[90]"False statement" is defined in our Draft Bill to include "any misstatement of fact, whether made by words, pictures, conduct or otherwise": see Draft Bill, s. 1(1) (*b*).

[91]See Draft Bill, s. 4.

[92]Earlier in this Report we indicated that consideration of a comprehensive no-fault accident compensation scheme was beyond the scope of this Report: *supra*, at p. 63. In our opinion, a no-fault scheme limited to compensation for injuries caused by defective products would not seem practical. If the concept of defect were abandoned, as would be the case under a no-fault scheme, there would not seem to be any rational basis for stopping short of a comprehensive compensation scheme as exists in New Zealand.

# PART IV

## CHAPTER 6

# ECONOMIC AND INSURANCE ASPECTS OF STRICT LIABILITY

In considering reform of the law of products liability, we have been concerned to investigate and to consider the economic and insurance implications of any change from a negligence regime to a regime of strict liability. We now turn to a discussion of these and related matters.

### 1. The Economic Basis of Strict Liability

Many of the arguments put forward in favour of strict liability have an economic foundation. We wish briefly to state these arguments.

It is often said that strict liability is an effective means of spreading losses caused by accidents. The effect of holding the manufacturer liable is to take the loss from the shoulders of the person injured and to distribute it among the consumers of the product. Loss sustained by injuries that are caused by defective products can be fairly said to be part of the cost of production.[1] It makes sense, therefore, to allocate that loss to the enterprise responsible for its occurrence: namely, the manufacturer of the product.[2] If the manufacturer passes on the cost of injuries to the ultimate consumers of the product, each consumer is paying the full cost of the product he is buying:[3] that is, the cost of the product plus a proportionate share of the cost of the injuries. If, however, the cost of injuries is not included in the price of the product, the injured person is, in effect, subsidizing all other users. The effect of strict liability may be to make production of some products unprofitable; for example, where the increased cost to the manufacturer cannot be passed on to his consumers. In such circumstances, it may be right that the manufacturer should cease business. A product that can only be produced at the expense of innocent persons injured by its defects perhaps ought not to remain on the market. Should there be a public interest in the availability of such a product, then possibly public funds should compensate innocent persons who are injured thereby.

In our view, the primary purpose of tort law in the area of products liability is to attain a rational, fair and workable system of accident compensation. The arguments summarized in the last paragraph address

---

[1]Fleming, *The Law of Torts* (5th ed., 1977), at p. 501: "Strict liability compels the manufacturer to insure consumers against defective products, the cost being ordinarily added to the price of the article."

[2]Law Com. No. 82 (Scot. Law Com. No. 45), *Liability for Defective Products* (1977), para. 23, at pp. 6-7.

[3]Fleming suggests that the effect of such payment of full production costs by the very public likely to be injured is a form of compulsory insurance. See Fleming, footnote 1, *supra*.

themselves to this objective. There is also another purpose often ascribed to tort law: namely, to control conduct. However, tort law is a haphazard and inefficient means of deterrence, and other means generally are relied upon to deter undesirable conduct. It is doubtful whether strict liability is a great deal more effective than negligence as a deterrent.[4] It should be pointed out that the element of deterrence was very little relied upon by the American courts and commentators in the development of strict liability. But there is one situation in which strict liability may affect a defendant's conduct. By "internalizing" the cost of accidents, strict liability encourages the manufacturer to develop cost-justified methods of reducing defects in his products.[5] As soon as it becomes less expensive to develop means of reducing defects than to pay the costs of accidents, a manufacturer will have a greater incentive to develop those means. Under a negligence regime, provided that a manufacturer follows common practice in the industry, and provided that the means of reducing defects are not a reasonably obvious precaution, he may possibly be able to continue his practice without liability.[6]

A consideration of these arguments has persuaded us that, on an economic basis, strict liability for damage caused by defective products is preferable to a principle of liability based on negligence in terms of both compensation and deterrence. One last point should, however, be made. This analysis supports the imposition of strict liability upon the manufacturer of a defective product; it does not deal directly with the problem of other business distributors, such as importers, wholesalers, distributors and retailers. The justification for imposing strict liability upon the retailer rests on a different basis. It is not that the retailer should take the ultimate risk of the defect; he can and should be provided with a claim for indemnity against the manufacturer. Rather the reasoning is that, as between the innocent business supplier and the innocent buyer, the supplier should take the risk of finding that the manufacturer is not amenable to suit, because he is insolvent, unidentified, or beyond the jurisdiction. The retailer has borne this risk under the developments in the law of implied warranties since 1875. Since this date, few have seriously suggested that this position should be reversed. Indeed, in recent times, the case for imposing strict liability upon the retailer is, if anything, stronger than before. It is often the retailer who is the moving force behind the marketing and distribution of goods. Moreover, at a time when many kinds of consumer goods are imported from foreign countries, there would be a serious gap in protection if an injured person were required to assert his rights against a manufacturer in some distant place.[7] A similar analysis supports the imposition of strict liability on other business suppliers such as wholesalers, importers and distributors.

---

[4]See Prosser, "The Assault upon the Citadel (Strict Liability to the Consumer)" (1959-60), 69 Yale L.J. 1099, at p. 1119.

[5]See Posner, "A Theory of Negligence" (1972), 1 J. Leg. Studies 29, at p. 33; Coase, "The Problem of Social Cost" (1960), 3 J. Law and Ec. 3; and, Posner, "Strict Liability: A Comment" (1973), 2 J. Leg. Studies 205, at p. 209.

[6]The manufacturer may still be liable if, for example, the common practice is itself negligent: see *infra*, at p. 95.

[7]Fleming, footnote 1, *supra*, at pp. 499-500.

## 2. Practical Effects of Strict Liability: Empirical Evidence

We have attempted to estimate the practical effects of the change in liability that we recommend. We fully appreciate the so-called "products liability insurance crisis" in the United States, and realize that it is important that the Commission should not recommend a change in Ontario law that would bring to Ontario the apparent defects of the American system. We have received submissions from manufacturers that express widespread concern that the problems experienced in the United States should not be imported into Ontario.[8] This, of course, is a perfectly legitimate concern. There is a natural assumption that adoption of the American doctrine of strict liability will lead to American problems, in particular, excessive insurance costs. It is, therefore, important to examine the evidence in order to determine the present practice in Ontario, and the causes of the American insurance problems.

In an attempt to discover as much information as possible about the present situation in Ontario, the Commission sent out two questionnaires. One questionnaire was sent, with the co-operation of the Canadian Manufacturers' Association, to all its Ontario members. The other was sent, with the co-operation of the Insurance Bureau of Canada, to all members of the Bureau. The response rates were 14% for the Canadian Manufacturers' Association questionnaire, and 12% for the Insurance Bureau of Canada questionnaire. These figures seem at first sight to be low; but they are within the range of what is generally expected in surveys of this type. It must be noted, however, that the sample is not, statistically speaking, a random sample. Those who chose not to respond may have done so for reasons that are not statistically neutral. One can speculate, for example, that many Ontario members of the Canadian Manufacturers' Association manufacture products that never give rise to products liability claims. Many of them may simply have ignored the questionnaire as inapplicable. On the other hand, some of the manufacturers of potentially hazardous products may have declined, as a matter of policy, to reveal information about liability claims, even in an anonymous questionnaire. It is a matter of speculation which way, if at all, the figures may be biased. The answers must, therefore, be taken simply for what they are: the response of a certain number of Ontario manufacturers and insurers.

Within these limits, there are some interesting conclusions to be drawn from the responses to the questionnaires. The first is that consumer complaints from individuals, as opposed to complaints from commercial buyers, constitute only a comparatively small number of the total complaints received by manufacturers. Complaints in respect of personal injuries, as might be expected, constitute an even smaller proportion of all complaints; that is, less than 1%. Further, the dollar amounts paid out to meet claims for personal injury compensation are so small as to be almost insignificant. Only four respondents (less than 1%), in the course of 1976, had made payments totalling, in each case, more than $10,000. In 1975, the figure was marginally

---

[8]The submissions were received as a result of a Background Paper on Products Liability sent out to the Canadian Manufacturers' Association, the Insurance Bureau of Canada, and the Consumers' Association of Canada, and in response to advertisements placed in numerous Ontario newspapers, the Ontario Reports, the Canadian Business Law Journal, *The Financial Times* and *The Financial Post*.

higher, five respondents making payments totalling, in each case, more than $10,000. Both questionnaires suggest that insurance is reasonably readily available to cover products liability risks, though, as would be expected, specialized risks seem to be handled by specialist insurers. There has been an increase in premiums in the last ten years, particularly for manufacturers selling their products in the United States. This situation, again, was to be expected. Most insurance premiums have risen recently. As a percentage of the full amount realized from sales, however, products liability premium costs seem to have decreased slightly: the figures show that the mean percentages, extrapolated from the information contained in the questionnaire, were 0.51% for 1976, 0.50% for 1977, and 0.31% for 1978.[9] These figures suggest that products liability premiums have not risen markedly faster than other costs that are ultimately reflected in the price of the manufacturer's product.[10]

As was shown earlier in this Report, the doctrine of strict liability would, in nearly all cases against manufacturers, produce much the same result as the present law of negligence.[11] The answer to one question on the questionnaire sent to the Ontario members of the Canadian Manufacturers' Association shows that about 70% of the respondents always admit liability on proof of a defect. That is, they appear to be already operating under a system of strict liability. Accordingly, it seems that in practice the difference between negligence and strict liability is small. Assuming that the level of claims remains constant, the added cost to manufacturers of the adoption of a regime of strict liability can be expected to be correspondingly slight.

Some briefs that we have received have expressed concern that adoption of a doctrine of strict liability may affect the level of claims by inducing a higher claims consciousness in the public.[12] There seems no reason, however, why adoption of strict liability should have such an effect. The plaintiff will still be required to prove the existence of a defect at the time when the product left the manufacturer's hands, and that the defect has caused his injury. He will still be responsible for the fees of his own lawyer and those of the defendant's lawyer if he is unsuccessful. Damages will still be restricted to what are, by American standards, very modest levels. We now turn our attention to the experience in the United States.

### 3. Insurance: The United States' Experience

There has been much discussion in recent years of a "products liability insurance crisis" in the United States. It was widely reported that products liability insurance was unobtainable for small manufacturers, and that many manufacturers had been driven out of business by their inability to obtain insurance coverage, or to obtain it at a reasonable price.

Public concern in the United States led to the establishment of the Interagency Task Force on Product Liability, which published a number of

---

[9]There were, however, only sixteen responses for 1978.

[10]This conclusion is based on our analysis of the responses to the questionnaires that were sent to the Ontario members of the Canadian Manufacturers' Association and the Insurance Bureau of Canada.

[11]*Supra*, at pp. 30-31.

[12]Footnote 8, *supra*.

studies, and issued its final Report in 1978.[13] The Task Force concluded that this concern was unfounded. It discovered no evidence of "unobtainability" of insurance, although it conceded that some manufacturers, especially small manufacturers, had experienced an "affordability" problem.[14] The Task Force acknowledged that at some point unaffordable insurance becomes practically unobtainable insurance; however, it thought that the incidence of such cases was not widespread.[15] It found no evidence of any manufacturer being driven out of business by the unavailability of products liability insurance, though the Task Force did acknowledge that such evidence would be difficult to obtain.[16] The final Report of the Task Force studiously avoided the word "crisis". It recognized, however, a "problem", particularly for the small manufacturer, in that some insurers had engaged in "panic pricing" during a period of legal uncertainty.[17] But in very few cases, even after the recent increases in premiums, did the Task Force find that the insurance premium amounted to more than one percent of the full amount realized by a manufacturer from sales. A telephone survey of 337 firms was carried out by the Task Force in December, 1976. From this survey, it appeared that the average products liability insurance cost for 1976 amounted to 0.281% of sales. In the case of small firms, with less than $2.5 million sales, this cost was 0.532% of sales.[18]

The Interagency Task Force on Product Liability considered various mechanisms for increasing the availability of insurance, including the following: namely, government subsidization of insurance; assigned risk plans; pooling mechanisms; federal government insurance and reinsurance; and, income tax concessions for self-insurers. All these mechanisms were found to have substantial difficulties, and although the Task Force thought that some were worthy of further study, it did not consider the situation sufficiently serious to recommend the adoption of any of these mechanisms.[19] Direct government intervention in the insurance market, in the view of the Task Force, was neither necessary nor justifiable, except in the case where a strong public interest required that a particular product, such as swine flu vaccine, should be made available.[20]

Devices of the sort mentioned here might be borne in mind, at some future date, as possible solutions for insurance problems in Ontario. There is, however, no evidence that there is at present, or is likely to be in the foreseeable future, any need for such extraordinary measures. Indeed, as we point out below, the general limitation suggested recently by the Supreme Court of Canada in respect of damages for non-pecuniary loss[21] suggests that

---

[13]United States Dept. of Commerce, *Interagency Task Force on Product Liability, Final Report* (1978).

[14]*Ibid.*, at pp. VI-2 ff., and at p. V-17.

[15]*Ibid.*, at pp. VI-12 ff.

[16]*Ibid.*, at pp. VI-32 - VI-34.

[17]*Ibid.*, at pp. I-27 - I-28.

[18]*Ibid.*, Table III-6, at p. III-55; and see also at p. VI-18.

[19]*Ibid.*, at pp. VII-115 ff.

[20]*Ibid.*, at p. VII-253.

[21]*Andrews et al.* v. *Grand & Toy Alberta Ltd. and Anderson*, [1978] 2 S.C.R. 229; *Thornton et al.* v. *School District No. 57 (Prince George) et al.*, [1978] 2 S.C.R. 267; *Arnold and Arnold* v. *Teno et al.*, [1978] 2 S.C.R. 287. Compare, *Lindal* v. *Lindal*, [1978] 4 W.W.R. 592 (B.C.S.C.), where $135,000 was awarded as damages for pain and suffering, although the Court indicated its adherence to the principles pronounced by the Supreme Court of Canada.

damage awards in Ontario are most unlikely to match the very large awards made in American jurisdictions. If at any time in the future there should be seen to be a need for a drastic intervention in the insurance marketplace, that will be the appropriate time to consider this question.[22]

In considering changes in Ontario law, we have attempted to determine the causes of the rise in premiums in the United States over the last few years. This rise in premiums would seem to be due far more to large and unpredictable jury awards than to the legal basis of liability.[23] In this context it should be noted that there is in the United States a constitutional right to trial by jury. The existence of this right has resulted in great judicial restraint in American jurisdictions in controlling jury awards. American courts will reduce a jury award only when it is so excessive as to be "unconscionable" or "shocking".[24] Our research indicates that there does not appear to be any reason to suppose that adoption of a principle of strict liability in Ontario would lead to an excessive increase in insurance premiums. This conclusion seems to be supported by the findings of the Insurance Services Office[25] closed claims survey: namely, that 50% of the bodily injury payments and 45% of the property damage payments were the product of fewer than 1% of the claims paid.[26] In testimony before a congressional committee, the Vice-President of the Insurance Services Office said that it "certainly seems to indicate that the problem seems to be a problem of exceedingly high claims, rather than a great number of claims".[27]

It may be useful, at this stage, to advert briefly to the American experience in a different, though perhaps related, area of liability. It is well known that in the United States there has been an insurance crisis in the field of medical malpractice, but plainly this crisis has nothing to do with strict liability. In all American states, the plaintiff in a medical malpractice case must show negligence. The reason for high premiums for medical malpractice insurance is the incidence of high damage awards. As we have mentioned above, awards of this nature would seem to have been responsible for the recent rise in products liability premiums in the United States. It is possible to suggest, therefore, that the reason that an insurer may be cautious in the field of products liability is the result of enormous damage awards that American juries have been apt to make; the comparatively small increase, in practice, in the incidence of liability effected by openly adopting a principle of strict liability would not seem to be, in itself, of great significance.

---

[22]It may be added that, in such circumstances, careful consideration ought perhaps to be given to replacing civil litigation as a means of accident compensation with a statutory compensation scheme, as has been done in New Zealand for all accidents and in Quebec in respect of motor vehicle accidents.

[23]Footnote 13, *supra,* at pp. I-26, II-47.

[24]Footnote 13, *supra*, at p. VII-64.

[25]The Insurance Services Office is a statistical insurance industry group organized by the insurance industry in the United States to help establish rates of insurance.

[26]Insurance Services Office, *Products Liability Closed Claim Survey: A Technical Analysis of Survey Results* (1977), Tables 13-3 and 13-4, at pp. 88-89, and see Hearings before the Subcommittee on Capital, Investment and Business Opportunities of the Committee on Small Business, House of Representatives, 95th Congress, 1st Session, 1977, at p. 1313.

[27]Hearings before the Subcommittee on Capital, Investment and Business Opportunities of the Committee on Small Business, footnote 26, *supra*, at p. 1333.

The largest part of damage awards by juries in United States cases is for pain and suffering; that is, for unquantifiable losses. The final Report of the Interagency Task Force referred to a study establishing that for every dollar awarded for out-of-pocket losses, $1.50 is awarded for pain and suffering.[28] The possibility of an enormous sum being awarded by a sympathetic jury is naturally apt to make an insurer cautious. On the other hand, as previously mentioned, the Supreme Court of Canada recently has suggested that, save in exceptional circumstances, damages for non-pecuniary loss are to be limited to a conventional maximum of $100,000.[29] Since this maximum was announced in a case where the plaintiff had been rendered a quadriplegic, it is hard to imagine many cases in which damages would greatly exceed that sum.[30] Another difference in practice between Canadian and American cases is that, in the United States, a plaintiff's counsel is permitted to ask the jury for a specific sum of money. For example, he can suggest that nothing less than $100 million will adequately compensate or sufficiently punish the defendant; the so-called "*ad damnum*" clause. In Ontario, plaintiff's counsel is not allowed to demand specific sums.[31]

The readiness of American courts to award punitive damages is another reason for very high awards in the United States. Recently, a judgment of $3.5 million was awarded against an automobile manufacturer for a defect in the designed location of a fuel tank in a motor vehicle.[32] Though Canadian courts have reserved the power to award punitive damages, the cases in which this power has been exercised are generally cases of deliberate infliction of damage.[33] It seems unlikely that punitive damages would be awarded in a products liability case. Moreover, the basis of an award of punitive damages does not depend upon strict liability. The basis of liability in the case of the improperly designed fuel tank was that the defendant had deliberately courted the risk of injury to persons in the plaintiff's position. The result, in relation to punitive damages, would not appear to have been dependent upon any rule of strict liability. Canadian courts are just as likely, or just as unlikely, to make punitive awards under a principle of strict liability as under the present negligence regime.

There are many other differences between Ontario and American procedures. The contingent fee undoubtedly makes it easier for the American plaintiff to litigate. While legal aid presumably has made it easier for certain persons in Ontario to litigate, we are not aware of any statistics that show that legal aid has had any impact on products

---

[28]Footnote 13, *supra*, at p. VII-64.

[29]*Andrews et al.* v. *Grand & Toy Alberta Ltd. and Anderson*, footnote 21, *supra*; *Thornton et al.* v. *School District No. 57 (Prince George) et al.*, footnote 21, *supra*; *Arnold and Arnold* v. *Teno et al.*, footnote 21, *supra*.

[30]See, however, *Lindal* v. *Lindal*, footnote 21, *supra*.

[31]See *Gray* v. *Alanco Developments Ltd. et al.*, [1967] 1 O.R. 597, (1967), 61 D.L.R. (2d) 652 (C.A.) and *Allan* v. *Bushnell T.V. Co. Ltd.*; *Broadcast News Ltd., Third Party*, [1969] 2 O.R. 6, (1969), 4 D.L.R. (3d) 212 (C.A.).

[32]See *Grimshaw* v. *Ford Motor Co.* (1978), 21 ATLA L. Rep. 136 (Cal. Sup. Ct.). The trial judge reduced the punitive damage award of the jury from $125 million to $3.5 million. This decision is at present under appeal.

[33]For a brief discussion of this point, see Linden, *Canadian Tort Law* (1977), at pp. 49-51.

liability litigation in this Province. Even more significant is the American rule that an unsuccessful plaintiff need not pay the defendant's costs. An American plaintiff, therefore, is in a position to litigate at little or no risk; if he loses, he will pay neither his own lawyer's fee[34] nor any of the defendant's costs. On the other hand, the present Ontario rules, particularly the principle requiring payment of the defendant's costs by an unsuccessful plaintiff, require a plaintiff to consider more carefully his decision to initiate litigation.

Another important factor affecting readiness to litigate is the higher level of social welfare benefits in Ontario as opposed to the United States. In most cases in Ontario, medical expenses will be paid out of public funds. Workmen's compensation and unemployment insurance benefits are higher in Ontario than in the United States.[35] It is true that the Ontario Health Insurance Plan is subrogated to any right of an insured person to recover the cost incurred for past insured services and the cost that will probably be incurred for future insured services.[36] However, only in extreme situations, we are informed, will the Plan initiate litigation where the claimant does not do so.[37]

A special point arises in the case of workmen's compensation. In Ontario, unlike the case in most American jurisdictions, an injured worker must elect between his compensation benefits and an action against

---

[34]However, he might be responsible for disbursements made by his own lawyer.

[35]A major study published in 1961 showed that in 36 states in the United States workmen's compensation laws replaced less than 20% of losses attributable to a workman's death and that in a major state, such as California, compensation for the seriously injured replaced, on average, about one-third of wage loss: see Cheit, *Injury and Recovery in the Course of Employment* (1961), at pp. 108-09, 182. Another study published in 1970 showed that in 31 states maximum case benefits for workmen's compensation fell below the state's poverty level. In Ontario, on the other hand, benefits may be as high as 75% of a workman's average weekly earnings: see *The Workmen's Compensation Act*, R.S.O. 1970, c. 505.

[36]*The Health Insurance Act*, S.O. 1972, c. 91, s. 35. Section 36(1) of *The Health Insurance Act* imposes an obligation on "[a]ny person who commences an action to recover for loss or damages arising out of the negligence or other wrongful act of a third party, to which the injury or disability in respect of which insured services have been provided is related shall . . . include a claim on behalf of the Plan for the cost of the insured services".

[37]This information was obtained in the course of our communications with the Ontario Health Insurance Plan. It should be pointed out that one of the major hurdles that OHIP must overcome in those cases where the claimant does not initiate litigation is that of learning about possible subrogated claims. Where it does learn of such claims, OHIP will assess the chances, if any, of success of a subrogated claim and will act accordingly. It should be noted that, as a result of agreement between the Ontario Health Insurance Plan and a large number of insurance companies, it is no longer necessary for most claimants to include a claim on behalf of OHIP where the services have been rendered in respect of personal injuries resulting from the negligent use or operation of a motor vehicle where:

1. the accident occurred on or after December 1, 1978;
2. at the time of the accident, the owner of the said motor vehicle was insured under a motor vehicle liability policy issued by an insured who is a party to the aforesaid agreement; and
3. at the time of the accident, the said motor vehicle bore Ontario number plates.

a third party outside the purview of the Act.[38] If he elects to take the benefits, as a large percentage do,[39] he has no action against the third party. In such cases, the rights of the injured employee are subrogated to the Workmen's Compensation Board, and it would seem that the Board exercises this right quite frequently.[40] However, the amounts recovered would not appear to be substantial.[41] In the United States, on the other hand, a high proportion of products liability claims, and an even higher proportion of damages recovered, arise out of injuries at the plaintiff's place of work.[42]

In briefs put forward by members of the public at the 1976 hearings of the Select Committee on Small Business of the United States Senate, concerned with products liability, and in the suggestions made to the Interagency Task Force on Product Liability, only rarely was restoration of the negligence regime suggested as a possible solution to the insurance problem. The suggestions commonly made are as follows: namely, to reduce the size of jury awards; to limit the right to jury trial; or, to establish strict limitation and cut-off time periods.[43] Legislation has been enacted in several states[44] restricting the rights of plaintiffs in products liability cases. These restrictions, however, generally take the form of imposing limitation and cut-off periods, allowing a defendant to raise a rebuttable defence on evidence of compliance with applicable standards, and preventing plaintiff's counsel from demanding specific sums of money. In a recent issue, the publication, *Product Liability Trends,*[45] lists in chart form the matters on which legislation might be anticipated. These are as follows: *ad damnum* clauses, that is, the

---

[38]*The Workmen's Compensation Act*, R.S.O. 1970, c. 505, s. 8(1).

[39]From the following figures, it would appear that approximately fifty percent of all employees entitled to benefits under *The Workmen's Compensation Act*, R.S.O. 1970, c. 505, when required to elect, will elect to take the statutory benefits.

| Year | Required to Elect | No. Electing Benefits under the Act |
|---|---|---|
| 1977 | 3036 | 1454 |
| 1978 | 3249 | 1679 |

[40]We are informed that, in 1977, the Workmen's Compensation Board disposed of 209 cases by either litigation or settlement. In 1978, the number of cases disposed of by the Board increased to 263. In those two years respectively, 377 and 343 new files were opened.

[41]We are informed that, in the years 1977 and 1978, the Workmen's Compensation Board recovered $1,178,543.34 and $1,214,066.58 respectively.

[42]O'Connell, "An Immediate Solution to Some Products Liability Problems: Workers' Compensation as a Sole Remedy for Employees, with an Employers' Remedy against Third Parties" (1976), Insurance L.J. 683.

[43]Footnote 13, *supra*, at pp. xliv - xlviii, VII-64 - VII-69, VII-75 - VII-80, and VII-18 - VII-28.

[44]See Birnbaum, "Legislative Reform or Retreat? A Response to the Product Liability Crisis" (1978), 14 Forum 251. An effort has been made recently to introduce uniformity in respect of the statutory restrictions on the principle of strict liability: see U.S. Dept. of Commerce, Draft Uniform Product Liability Law, 44 Fed. Reg. 2996 (1979). Perhaps the most important provision of this draft legislation is section 109, dealing with cut-off and limitation periods. The former is based on a concept of "useful safe life", which is presumed to be 10 years after delivery of the completed product to its first purchaser or lessee who was not engaged in the business of selling products of that type; the latter is stated to be 3 years from the time the claimant discovered, or in the exercise of due diligence should have discovered, the facts giving rise to the claim.

[45]"Pending Product Liability Legislation in Selected States" (1977), 1 Product Liability Trends 29.

power of plaintiff's counsel to demand a specific sum for damages; contingent fees; imposition of limits on awards for pain and suffering; indemnity and contribution; judicial review of damage awards; "useful life"; limitation on liability; workmen's compensation changes; statute of limitations; the "state of the art" defence; compliance with safety standards defence; the alteration or misuse defence; the definition of defect; admissibility of evidence of collateral benefits; punitive damages; insurance data collection; admissibility of evidence of subsequent changes; the duty to warn; and, damages by way of periodic payments. Some of these matters are discussed in more detail in this Report. At this stage all that we wish to point out is that it seems that the major concern in the United States is with large awards rather than with the substantive basis of liability.

A considerable number of the features proposed or enacted in the United States have always been a part of Ontario law or practice. From our review of the American experience, it would seem to follow that the American products liability insurance problem has very little relevance to the advisability of an open recognition of the principle of strict liability in Ontario.

### 4. Conclusion

The empirical evidence discussed in the preceding section supports the conclusion that adoption of a principle of strict liability is unlikely to cause any marked increase in the cost of insurance premiums in Ontario. Some increases may occur initially, as insurers adjust to the new rules. In the light of experience, premiums would be expected to level off at a rate, in 1979 dollars, very little higher than the present rate. American experience shows that there was at first no marked difference in insurance premiums in strict liability states and states where negligence still had to be proved.[46] A study of the American situation strongly suggests that the subsequent increases in the cost of insurance premiums have had very little to do with the substantive law of products liability, but are closely related to the high damage awards caused by aspects of the American civil litigation system almost entirely absent from Ontario. So long as this state of affairs continues, there would seem to be no danger of importing into Ontario the American products liability insurance crisis.

---

[46]See Note, "Products Liability and the Choice of Law" (1965), 78 Harv. L. Rev. 1452, at p. 1456, where the writer says: "Indeed current insurance practices permit a manufacturer to insure his products at roughly the same cost whether he makes them in a negligence state or a strict [liability] state." See also O'Connell, *Ending Insult to Injury* (1975), at pp. 56-57, where O'Connell notes the irony that what Prosser had triumphantly called the most spectacular overthrow of an established rule of law in the history of the law of torts apparently created not even a ripple in the rate structure of insurance premiums.

## CHAPTER 7

# THE SCOPE OF STRICT LIABILITY

Earlier in this Report we recommended the adoption of a principle of strict liability in tort for damage caused by defective products and for damage caused by reliance upon a false statement made by a supplier concerning a product. This general recommendation leaves a number of questions unanswered. We now turn to a discussion of these questions.

### 1. Type of Damage

One of the most difficult questions that the Commission has had to answer is as follows: should the rule of strict liability which we recommend apply only to personal injuries, to personal injuries and property damage, or to all categories of damage occasioned by defective goods including economic loss? Two different approaches have been adopted or proposed in other jurisdictions to resolve this question. One approach has been to define narrowly the term "defect" so as to restrict liability to safety related aspects of a product; for example, legislation may require that a product be "unreasonably dangerous" before strict liability will be imposed. The other, and more direct, approach has been to restrict the categories of damage recoverable.

In the United States, each approach has been employed. A good example of the combined application of both approaches is section 402A of the *Restatment (Second) of Torts*.[1] This section only applies where a product is unreasonably dangerous to a consumer or user, or to his property, and it also restricts recovery to "physical harm", that is, personal injuries and property damage as well as consequential economic loss. Recovery for pure economic loss — that is, loss not directly consequent upon either physical injury or property damage — is not included. Under section 2-318 of the American *Uniform Commercial Code*,[2] Alternatives A and B apply only in cases of personal injury; Alternative C, on the other hand, applies to property damage and pure economic loss, as well as to personal injury.

Each of these approaches has also been utilized in Canada. The New Brunswick *Consumer Product Warranty and Liability Act, 1978*,[3] for instance, would seem to extend to all losses, including pure economic loss, except those suffered in a business capacity. However, under this legislation, goods that give rise to a cause of action for these losses must have been supplied by way of contract to some person, although not necessarily the plaintiff. In the absence of a contract, the provisions in the New Brunswick

---

[1]American Law Institute, *Restatement (Second) of Torts* (1965), discussed *supra*, at pp. 54-55.

[2]American Law Institute, *Uniform Commercial Code*, 1972 Official Text with Comments, discussed *supra*, at pp. 51-54.

[3]S.N.B. 1978, c. C-18.1, discussed *supra*, at pp. 41-44.

Act extend only to safety related defects. The proposed amendments to the Quebec Civil Code[4] and the recent Quebec *Consumer Protection Act*[5] would seem to apply to all losses. The extended right of recovery under section 5 of the Saskatchewan *Consumer Products Warranties Act, 1977,*[6] on the other hand, is restricted to damages arising from personal injuries.

Finally, the principle of strict liability proposed by the English and Scottish Law Commissions,[7] as well as that proposed by the Pearson Commission,[8] would cover only personal injuries suffered as a result of a defective product. In the case of the Pearson Commission, its terms of reference were restricted to a consideration of the extent to which, the circumstances in which, and the means by which compensation should be payable in respect of death or personal injury suffered by any person. The Law Commissions, however, considered and expressly rejected extension of the regime of strict liability to property damage and to other kinds of loss as well, such as pure economic loss. It should be noted that, under the Law Commissions' proposals, existing law in respect of compensation for property damage and other kinds of loss, such as pure econimic loss, would remain intact; in other words, actions for such losses, whenever recoverable, would continue to be founded in negligence or in contract.

As we have noted above, formulations of the principle of strict liability in some jurisdictions have included a requirement that a product not only be defective but also that it be "unreasonably dangerous". The Commission has considered and rejected this approach as an appropriate means of controlling the ambit of strict liability for defective products. In our view, the requirement of "unreasonable danger" is too limiting. A plaintiff who is able to establish the existence of a defect in a product that has caused him injury, in our opinion, should be entitled to compensation for certain of his damages, regardless of whether the product is "unreasonably dangerous" or, indeed, simply "dangerous". We, however, accept the underlying notion of reasonableness and would note that our Draft Bill defines a "defective product" to include this requirement; that is, a product will only be considered to be a defective product if it falls short of the standard that may reasonably be expected of it in all the circumstances.[9]

Having canvassed this technique, we must now consider the second approach: namely, the categories of damage to which our principle of strict liability should apply. The difficulty in arriving at a suitable solution to this issue stems from the different policy objectives that a law of products liability seeks to achieve. First, it may be contended that the basic purpose of a law of products liability is accident compensation.

---

[4]Quebec Civil Code Revision Office, *Report on the Quebec Civil Code* (1977), discussed *supra*, at pp. 57-58.

[5]Bill 72, 3rd Session, 31st Legislature (1978), discussed *supra*, at pp. 46-47. The Act has not yet been proclaimed in force.

[6]S.S. 1976-77, c. 15, discussed *supra*, at pp. 39-41.

[7]Law Com. No. 82 (Scot. Law Com. No. 45), *Liability for Defective Products* (1977), para. 121, at pp. 35-36.

[8]*Royal Commission on Civil Liability and Compensation for Personal Injury* (1978) (Cmnd. 7054).

[9]See Draft Bill, s. 1(1)(*a*).

On this basis, compensation for personal injuries would seem to be a sufficient response: the phrase "accident compensation" suggests a scheme of compensation for personal injuries. The second policy that may be asserted is that suppliers of products, as a cost of doing business, should bear the risk of losses caused by their products. Under this rationale, there would not appear to be any reason to restrict the categories of damage to which the principle of strict liability should apply. Thirdly, the policy underlying a law of products liability may be perceived as one of consumer protection. Under such a policy, since consumers may suffer property damage and economic loss as well as personal injuries by reason of a defective product, again there would not seem to be any reason to exclude automatically compensation for the former categories of damage.

To overcome the anomalies of the existing law of products liability, we recommend that the proposed principle of strict liability should cover personal injury and, subject to the qualification mentioned below, damage to property suffered as a consequence of a defective product.[10] Such losses are recoverable under the existing law of negligence and, in our view, this recommendation would significantly rationalize existing law. It would provide an express statement of what is now, in some respects, the law of products liability in practice.

The primary reason for the recommendation of the English and Scottish Law Commissions that strict liability for defective products should provide compensation for personal injury and death, but not for property damage or other kinds of damage, such as pure economic loss, was the probable existence of first party insurance covering such losses. The Law Commissions commented as follows:[11]

> As we indicated at the outset, general considerations of policy require that first party insurance should be encouraged where it is usual and appropriate. Damage to commercial premises and property is usually covered by the owner's taking out first party insurance and this seems appropriate. In the non-commercial sector first party insurance is much more common in regard to damage to property than it is in regard to personal injury. Most householders insure their own homes, and where the premises are rented the premises are usually insured either by the tenants or by the landlords. A large number of people insure the contents of their homes and their cars against damage or destruction, and 'all-risks' policies for damage to property outside the home are frequently taken out. The information obtained on consultation does not allow us to go too deeply into the statistics of property insurance in the United Kingdom, but we are advised that first party insurance in respect of damage to property is usual and is generally regarded as prudent and appropriate.

The Law Commissions were of the view that strict liability would be of no immediate benefit to the claimant with first party insurance, but would result in extra costs to the producer who insures against third party

---

[10]See Draft Bill, s. 3(1).

[11]Footnote 7, *supra*, para. 120, at p. 35 (footnote omitted).

claims for damage to property. These extra costs would be passed on to the general public in the price of the product. Consequently, the Law Commissions stated as follows:[12]

> Overall, those members of the public who took out first party insurance would be worse off than they are under the existing law, as they would be paying the same for their own insurance but would have to pay more for the products.

We are not persuaded by these arguments of the Law Commissions. Assume, for example, that as a result of a defective can of lighter fluid, a person at a barbecue suffers personal injuries, damage to his clothing and to his house. Under the principle of strict liability proposed by the Law Commissions, he could recover compensation for his personal injuries; however, he would not be able to recover compensation for the damage to his personal property or to his house, unless he could establish negligence on the part of the supplier.[13] In our view, such a result would seem to be anomalous and to lack merit. Moreover, it seems to us important to note that some persons will not have adequate insurance. Further, even if the existence of first party insurance were prevalent, we would not share the view of the Law Commissions that, should a principle of strict liability be introduced, those who are so insured would pay not only insurance premiums but also more for the products. If the claimant's insurer had recourse against the supplier of the defective product responsible for the claimant's property damage, the first party insurance, at least theoretically, should be less expensive. Finally, we wish to point out that most American jurisdictions have adopted a principle of strict liability that allows recovery for damage to property. As we have noted, there is a very close trading relationship between the United States and Canada[14] and, if recovery under the proposed principle of strict liability were to be restricted to compensation for personal injuries, the American manufacturer who distributes goods in Ontario would continue to find himself more favourably treated here than at home.

It is our view that the recommended principle of strict liability should be restricted, however, to non-business losses in the case of property damage. We are mindful of the fact that certain business losses are recoverable under our present law of negligence. An injury to a farmer's livestock or damage to his crops, for example, may be the subject of an action in negligence, and this kind of loss would continue to be so recoverable.[15] However, it is our opinion that the main thrust of reform in the law of products liability should be the protection of non-business interests, where it is more likely that the full burden of the loss will be borne by the plaintiff personally. Accordingly, we recommend that the proposed principle of strict liability for defective products should not extend to damage to property used in the course of carrying on a business.[16]

---

[12]*Ibid.*, para. 121, at p. 35.

[13]For a discussion of the relationship of the proposed principle of strict liability to the existing law, see *infra*, at pp. 104-05.

[14]*Supra*, at p. 35.

[15]*Infra*, at pp. 104-05.

[16]See Draft Bill, s. 3(2).

We now turn our attention to the subject of pure economic loss that is caused by a defective product. This type of loss presents a more difficult problem, if for no other reason than that there are different kinds of economic loss. One kind of pure economic loss is that caused by a product's failure to meet its expectation value: for example, a purchaser may pay a high price for carpeting that turns out to be defective and, consequently, useless but not apt to cause personal injury or property damage. Strict liability in tort seems to us to be an inappropriate framework for the recovery of loss based on deficient value, and most American courts have refused to extend the strict liability theory to such losses.[17] This general issue has been extensively canvassed by the Ontario Law Reform Commission in its 1972 *Report on Consumer Warranties and Guarantees in the Sale of Goods*[18] and also in its 1979 *Report on Sale of Goods*.[19] There would seem, therefore, to be no need to repeat this discussion in these pages.

A second kind of pure economic loss is financial loss suffered as a result of a defective product which is not consequent upon accident-caused physical damage to the plaintiff's own person or property. Examples of this type of economic loss include business losses such as loss of profits, wasted time and materials, and loss of business reputation. Non-business economic loss of this kind may also be caused by a defective product. The cost of repainting a house treated with defective paint, and the cost of indemnifying another injured by a defective product, are but two examples of this kind of economic loss. Such losses are regularly recovered in cases of breach of warranty under existing contract law.[20] If one of the purposes of adopting a principle of strict liability is the elimination of the anomalies that can occur as a result of differences in existing tort law and contract law, perhaps recovery of this kind of economic loss should be available under the principle of strict liability that we have recommended. Remote losses could be excluded by the application of general principles of causation and remoteness of damages. Various arguments, however, can be marshalled against this view.

In respect of economic losses suffered in the course of a business, it can be argued first that the plaintiff will often be as good an insurer against the loss as the supplier of the product, although in some instances losses may be indeterminable in advance and insurance may be unduly expensive or simply unavailable. Secondly, it may be contended that such losses should be absorbed as part of the cost of doing business. Thirdly, the extent of loss that might result from a defective product in the business context is usually best predicted by the business that might suffer the loss: the loss may vary greatly from enterprise to enterprise; it may vary over time within one enterprise. Finally, liability for pure economic

---

[17]*Seely* v. *White Motor Co.*, 45 Cal. Rptr. 17, 403 P. 2d 145 (1965); *Morrow* v. *New Moon Homes Inc.*, CCH *Products Liability Reports*, para. 7675 (1976). The New Jersey Supreme Court took the contrary view in *Santor* v. *A. & M. Karagheusian Inc.*, 44 N.J. 52, 207 A. 2d 305 (1965).

[18]Ontario Law Reform Commission, *Report on Consumer Warranties and Guarantees in the Sale of Goods* (1972).

[19]Ontario Law Reform Commission, *Report on Sale of Goods* (1979), ch. 10, and see Draft Bill, s. 5.18.

[20]*Supra*, at p. 26.

loss could expose the supplier of a defective product to too great a burden. The loss of profits that could ensue from the failure of an electric transformer, for instance, could impose an extraordinary financial burden on the supplier. Accordingly, if recovery for pure economic loss were included within our principle of strict liability, provisions in respect of disclaimer or exclusionary clauses would be necessary. If such clauses were permitted, the right to recover pure economic loss in practice would be impaired as disclaimer clauses would be the rule rather than the exception.

Economic loss may be suffered in a non-business context; for example, a person's home may be rendered uninhabitable by a defective product, causing that person the expense of suitable, alternative accommodation. All of the arguments set out above are directed to economic loss suffered in the course of business. Some of these arguments have no application where economic loss is not suffered in the course of business, and the others appear much less persuasive. The question is a difficult one and continues to give rise to conflicting decisions in the United States.[21] However, the exclusion of pure economic loss from the proposed principle of strict liability will not always leave a person without a remedy. The developing law of negligence, and the provisions of the proposed revised Sale of Goods Act[22] and consumer product warranty legislation such as that proposed in the Commission's 1972 *Report on Consumer Warranties and Guarantees in the Sale of Goods* will cover many cases of pure economic loss caused by products. Restriction of recovery under the Draft Bill to personal injury and property damage will sometimes permit recovery for damage to the defective product itself, a kind of damage that is often difficult to distinguish from pure economic loss.

It is our view that the paramount need for reform lies in the area of personal injuries and damage to property other than that used in the course of carrying on a business. Accordingly, we have concluded[23]

---

[21]See, for example, *Seely* v. *White Motor Co.*, footnote 17, *supra*; *Santor* v. *A. & M. Karagheusian Inc.*, footnote 17, *supra*; and, *Morrow* v. *New Moon Homes Inc.*, footnote 17, *supra*.

[22]See Ontario Law Reform Commission, *Report on Sale of Goods* (1979), Draft Bill, ss. 5.18, 9.16.

[23]The Chairman of the Commission, Dr. Derek Mendes da Costa, dissents from this recommendation for the following reasons:

> I agree, for the reasons stated in the Report, that the principle of strict liability should not extend to pure economic loss suffered in the course of a business. However, I am of the opinion that there should be recovery for pure economic loss suffered in a non-business context. In the examples given in the Report, I know of no reason why a person whose house is painted with a defective paint, or whose home is rendered uninhabitable by a defective product, should not be able to recover, respectively, the cost of repainting or the expense of suitable alternative accommodation. As these examples indicate, it is unlikely that liability of this nature would expose a supplier to any extraordinary financial burden. Moreover, it would seem that the supplier of the defective product would, in many cases, be better able than the user to foresee and predict the occurrence and extent of potential loss. Remote losses could be excluded by the application of the general principles of causation and foreseeability. Nor does it seem to me appropriate to leave these matters to be resolved by existing law, or by prospective reform of the law. It is apparent to me that some persons may be left without a remedy and, in my view, a person should not go uncompensated in this important area of the law. In addition, it is worth noting that

that the proposed principle of strict liability should not extend to pure economic loss, and we so recommend.[24]

We wish to make it clear that economic loss that is directly consequent either upon personal injury, or upon damage to property that is not used in the course of carrying on a business, should be recoverable under our proposal. This type of economic loss is, in effect, triggered by personal injury or property damage and, in our view, cannot realistically be separated from such injury or damage. Economic losses of this sort, such as lost wages and out-of-pocket expenses, are recoverable under the present law of negligence. Accordingly, we recommend that economic loss directly consequent upon personal injury, and upon damage to property other than that used in the course of carrying on a business, should be recoverable under the principle of strict liability for defective products that we have earlier recommended.[25]

Finally, we turn to consider the scope of liability in a case where a false statement about a product has been made and occasions injury. For example, a manufacturer's handbook may show that a wire cable has a certain tensile strength whereas, in fact, the wire's tensile strength is not as great as stated in the handbook. Where reliance upon a false statement made by a supplier concerning a product causes personal injury or damage to property, the maker of the statement should be strictly liable for the loss caused by such reliance, whether or not the reliance is that of the person suffering the injury or damage, and we so recommend.[26] However, in accordance with our previous recommendations, we recommend that liability in the case of false statements should be restricted to liability for personal injury, and for damage to property other than that used in the course of carrying on a business, and for economic loss directly consequent upon such injury or damage.[27] In other words, the proposed principle of strict liability, in such a case, should not extend either to damage to property used in the course of carrying on a business or to pure economic loss.

## 2. Monetary Limits on Recovery

Some jurisdictions have considered the imposition of a monetary limit on the recovery of damages. The monetary limit takes two forms.

---

an injured party may not carry insurance against the risk of this kind of loss. Finally, I am of the opinion that this same reasoning applies to liability occasioned by reliance upon a false statement. In my view, the proposed principle of strict liability, in such a case, should cover not only liability for personal injury, and for damages to property other than that used in the course of carrying on a business, and for economic loss directly consequent upon such injury or damage, but should also extend to include liability for pure economic loss suffered in a non-business context.

One of the Commissioners, the Honourable Richard A. Bell, wishes to add the following:

Initially at the Commission meeting considering the exclusion of pure economic loss, I expressed myself as *dubitante*. After reading the Chairman's dissent, and giving the issue further thought, I concur respectfully in his reasoning. Indeed, I have difficulty in rationalizing the exclusion of pure economic loss suffered in the course of a business.

[24]See Draft Bill, s. 3.
[25]*Ibid.*
[26]See Draft Bill, s. 4.
[27]*Ibid.*

First, a limit may be set on the amount recoverable by any one plaintiff on a given set of facts. The other form involves restricting the total sum for which a defendant might be liable in respect of any one product or run of products. The former approach is adopted by the E.E.C. draft Directive, which provides a monetary limit for each claim. The Strasbourg Convention, on the other hand, permits individual states to limit the compensation awarded to each person and the compensation awarded for the totality of damage caused by identical products having the same defect. The English and Scottish Law Commissions considered these possibilities but rejected them on the grounds that individual financial limits would operate unfairly to individual plaintiffs, and that a general limit for a product or run of products likely would raise insuperable administrative problems in ascertaining those entitled to claim and in distributing the fund.[28] These grounds seem persuasive. If a plaintiff has in fact suffered the loss that he claims, and the defendant is liable, there seems no rational basis for restricting the plaintiff's right to recover. To the extent that the plaintiff's injuries are left uncompensated, in our view, such a restriction would enrich the defendant at the expense of the plaintiff. On the other hand, if there is a case to be made that plaintiffs are, or are likely in the future, to be overcompensated, the solution would appear to lie in amendment to the processes of civil litigation to ensure that overcompensation does not occur. Such an amendment would, however, be a general amendment, and not referable specifically to the law of products liability. In view of the recent decisions of the Supreme Court of Canada suggesting that, save in exceptional cases, damages for non-pecuniary loss should not exceed $100,000,[29] it seems unlikely that a strong case can be made that seriously injured persons are or will be overcompensated by our civil litigation system. Accordingly, we do not recommend that compensation for injury or damage caused by a defective product or by reliance upon a false statement made by a supplier concerning a product should be subject to a monetary limit, as to either the amount recoverable by any one plaintiff on a given set of facts or the total sum for which a defendant might be liable in respect of any one product or run of products.

### 3. Limitation and Cut-Off Periods

Another technique which has been proposed to restrict recovery under a principle of strict liability is the establishment of a special limitation period or the introduction of a cut-off period.

Both the Strasbourg Convention and the E.E.C. draft Directive provide for a three year limitation period for the institution of products liability actions. This period would run from the day when the injured person became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer. The English Law Commission and the Scottish Law Commission differed on the question of whether to accede to these international agreements. The English Law Commission

---

[28] Footnote 7, *supra*, paras. 134-35, at p. 42. See also para. 138, at p. 43.

[29] *Andrews et al.* v. *Grand & Toy Alberta Ltd. and Anderson*, [1978] 2 S.C.R. 229; *Thornton et al.* v. *School District No. 57 (Prince George) et al.*, [1978] 2 S.C.R. 267; *Arnold and Arnold* v. *Teno et al.*, [1978] 2 S.C.R. 287. Compare, *Lindal* v. *Lindal*, [1978] 4 W.W.R. 592 (B.C.S.C.).

found the three year limit acceptable.[30] The Scottish Law Commission, on the other hand, was of the opinion that the question of the appropriate limitation period and the time at which it commences to run should be left to domestic law.[31]

Under existing Ontario law, proceedings in respect of damage occasioned by a defective product must be commenced within six years after the accrual of the cause of action.[32] Recently, in Ontario, the Ministry of the Attorney General published a *Discussion Paper on Proposed Limitations Act*[33] based, to some extent, on this Commission's 1969 *Report on Limitation of Actions*. This Discussion Paper contained a draft Limitations Act, which proposed that actions for personal injury and property damage should be subject to a two year limitation period,[34] but that the running of time should be postponed until the plaintiff knew or ought to have known the identity of the defendant and the facts upon which his action was founded.[35] Should this proposal be implemented by legislation, it would mean that an action could be brought long after the sale and distribution of a product if, for example, an unknown defect caused an injury many years subsequent to its actual distribution. Such a possibility, in the opinion of the Commission, would not place an unfair burden on the defendant, and it is, of course, a burden that he bears under the present law of negligence, whereby the plaintiff's action does not accrue until the damage caused by the product is suffered.[36] However, the longer the period of time that has elapsed since the initial distribution of the product, the more difficult it will be for the plaintiff to show that the product was in fact defective when it left the defendant's hands. For these reasons, we support the approach adopted in the proposed Limitations Act. We wish to make it clear that we see no merit in the prescription of a special limitation period applicable only in respect of actions for the recovery of damages under the proposed principle of strict liability. Accordingly, we do not recommend any special limitation period.

To protect a defendant against actions brought long after the initial distribution of a product, what would be required is not a short limitation period, but rather a "cut-off" period. A "cut-off" period would provide a supplier of a defective product with immunity after the lapse of a specified time from the initial distribution of the product. The Strasbourg Convention and the E.E.C. draft Directive provide for a ten year cut-off period from the initial distribution of the product, after which proceedings against a producer of a defective product may not be instituted.[37] The effect of

---

[30]Footnote 7, *supra*, para. 165, at p. 50.

[31]*Ibid.*, para. 166, at p. 50.

[32]*The Limitations Act*, R.S.O. 1970, c. 246, s. 45(1)(*g*).

[33]Ministry of the Attorney General, *Discussion Paper on Proposed Limitations Act* (1977).

[34]*Ibid.*, s. 3(1)(*a*).

[35]*Ibid.*, s. 6(4).

[36]See Fleming, *The Law of Torts* (5th ed., 1977), at p. 177. See also *Long et al.* v. *Western Propeller Co. Ltd. et al.* (1968), 63 W.W.R. 146, 67 D.L.R. (2d) 345 (Man. C.A.); *Brook Enterprises Ltd.* v. *Wilding and Jones et al.*, [1973] 5 W.W.R. 660, (1973), 38 D.L.R. (3d) 472 (B.C.S.C.); *Watson* v. *Winget Ltd.*, [1960] S.L.T. 321 (H.L.).

[37]Footnote 7, *supra*, para. 150, at p. 46:

> There is a slight difference in that with the Strasbourg Convention the period starts with the date on which the product was put into circulation by the producer [Art. 7], whereas the EEC Directive provides for it to start at the end of the year in which the product was put into circulation [Art. 9] (footnotes omitted).

the cut-off rule is to prevent the commencement of proceedings after the lapse of the period. Thus, a claimant who is injured just after the lapse of the period will have no cause of action at all, however meritorious his claim in other respects, and a claimant injured shortly before the expiry of the period may find that the cut-off period has expired before he can, even acting with all dispatch, institute proceedings. These consequences are bound to give rise to anomalies. Further anomalies will spring from the fact that identical products may be stored for different periods of time before or after retail sale. Thus, where two persons buy identical products on the same day, and are injured by defects in the products, the success of each against the producer of the product may vary according to the time during which the products have been stored either on the retailer's shelves, or in the wholesaler's warehouse, or by the plaintiff, or by an earlier purchaser before use. Generally consumers neither know nor are able easily to discover the date at which the defective product left the manufacturer's hands. Further, if the action is brought against the manufacturers of defective components, different cut-off periods will apply in respect of each component. In any event, it seems doubtful whether a single time limit of universal application is appropriate to the wide range of products that may cause injuries.

In the case of many products, even without any statutory cut-off period, a lapse of ten years from the date of initial distribution may well present very real practical problems to the plaintiff, who must prove that the product was defective when it left the manufacturer's hands. It may be reasonable to suppose that, in the case of many products, an initial defect will not be provable after ten years of use. It is possible, however, to envisage a product that is stored for ten years in a warehouse. In such a case, the problem of proof of initial defect may be less difficult. Moreover, there are many products from which more than ten years use can be reasonably expected. Components used in ships or aircraft and building materials are but a few examples of such products. In the case of other products, such as drugs, an injury may occur within the cut-off period of ten years but might only become apparent outside this period. In all cases referred to above, it seems anomalous and arbitrary to deprive the plaintiff completely of his claim because of the running of a cut-off period. This is a further point on which the English and Scottish Law Commissions differed, the Scottish Law Commission rejecting the concept of a cut-off period, largely for the reasons just given.[38] The English Law Commission, on the other hand, was willing to accept the ten year cut-off period. In the Law Commissions' Report on *Liability for Defective Products,* the English Law Commission stated as follows:[39]

> The Law Commission are impressed by the criticisms of the cut-off period made by the Scottish Law Commission, and accept that the period is arbitrary and, for this reason, capable of working hardship and injustice to persons injured in the later stages of a product's life. However the cut-off period of 10 years is not likely to be of much relevance to perishable goods and as for durable goods,

---

[38]*Ibid.*, paras. 154-60, at pp. 47-49.
[39]*Ibid.*, paras. 151-52, at pp. 46-47.

> such as motor cars and building materials, the Law Commission believe that a cut-off point is needed in fairness to the producers on whom the burden of strict liability must otherwise rest indefinitely.
>
> It is in the producer's interest that he should be able to close his books on a product after it has been in circulation for a fixed period. It assists him in assessing the risk and it facilitates insurance and amortisation, thus keeping the insurance premium down. There is thus some saving, albeit marginal, which redounds to the general benefit of the public. More important, perhaps, it sets a date after which the producer no longer has the burden of proving that a product which caused an accident was not defective when he put it into circulation. This burden is increasingly difficult for him to discharge as the years pass and it seems only fair that there should come a point when it is entirely removed.

These arguments, based as they are on the convenience to the defendant of being able to "close his books", do not, in our view, outweigh the criticisms voiced by the Scottish Law Commission, which were based on the very real possibility of substantial unfairness and arbitrariness. It should be remembered that, under the existing law of negligence, the manufacturer of a product can never "close his books", since a cause of action in negligence accrues when the damage is suffered.[40] In practice, of course, the longer the period that has elapsed since the distribution of the product, the more difficult it will be for the plaintiff to show that it was initially defective. But if he can discharge that burden there seems no good reason why recovery should be denied. It should be noted, too, that the proposals of the English and Scottish Law Commissions contemplate a new principle of strict liability that would co-exist with the present law of negligence. Consequently, a plaintiff, whose cause of action under the proposed principle of strict liability might be extinguished by the cut-off period, might still be able to sue for negligence.

Later in this Report,[41] we recommend that, as with the position of the English and Scottish Law Commissions, the proposed principle of strict liability should leave undisturbed the present law of negligence. The possibility that an injured person might sue for negligence notwithstanding the expiry of a cut-off period, in our view, detracts significantly from the only argument that supports the position taken by the English Law Commission: namely, that a cut-off period will enable the manufacturer to "close his books". So long as the existing law of negligence remains, he will not be able to "close his books". In any event, for the reasons we have stated, we are persuaded that no special cut-off period should be prescribed in respect of actions for the recovery of damages under the proposed principle of strict liability. We so recommend.

### 4. Types of Product

The question we now consider is whether our recommended principle of strict liability should apply to all products, or whether certain products should be excluded. In our opinion, this principle should extend to all products,

---

[40] *Supra*, at p. 87.
[41] *Infra*, at p. 105.

whether or not they are attached to or incorporated into real or personal property,[42] unless, in relation to any particular product, there are cogent reasons to the contrary. Products that have been singled out for possible special treatment include pharmaceuticals, components and natural products. While, as will be noted, we do not favour the exemption of any of these products from the proposed principle of strict liability, we wish to make the following comments.

### (a) PHARMACEUTICALS

The English and Scottish Law Commissions considered, but rejected, the possibility of exempting manufacturers of pharmaceuticals from the proposed principle of strict liability.[43] The English Law Commission summarized its conclusion as follows:[44]

> The Law Commission believe that all the policy considerations in favour of imposing strict liability on producers apply with as much force to pharmaceuticals as they do to other products. The producer of defective pharmaceuticals creates the risk; he is the person best able to control the quality of the product; he is the person best able to insure against claims; and public expectation that drugs on the market will be safe is raised by advertising and by the promotional material with which the pharmaceutical industry supply the medical profession. Finally the thalidomide case itself, the history of which is too well known to need recounting, illustrates the procedural and evidentiary problems that face the claimant who seeks compensation under the existing law. The conclusion of the Law Commission is that strict liability for injuries caused by defective pharmaceuticals should be imposed on those who produce them. A substantial number of commentators arrived at the same conclusion. This is not to say that the Law Commission would necessarily oppose the idea of a central compensation fund for persons injured by drugs (whether prescribed or not) or other kinds of misadventure. But, like the Scottish Law Commission, they believe that the Royal Commission [on Civil Liability and Personal Injury] are the appropriate body to consider the advantages and disadvantages of such a fund.

We are in agreement with the English Law Commission. We know of no conclusive evidence that establishes that the introduction of a principle of strict liability will impede research and development in the pharmaceutical field. Even if there were such evidence, we are not convinced that research and development should be at the expense of individual plaintiffs.

---

[42]In our discussion of the existing law relating to products liability in Ontario, we noted that the manufacturer of a product incorporated into real property would be liable if the product were defective: see *supra*, at p. 12. We see no reason to depart from this position.

[43]Footnote 7, *supra*, paras. 55-65, at pp. 19-22.

[44]*Ibid.*, para. 61, at p. 21. The Scottish Law Commission expressed its concern for the need to enact special legislative provisions for producers of certain pharmaceuticals such as prescription medicines; however, the Commission had no specific proposals to make in this regard: footnote 7, *supra*, paras. 62-65, at pp. 21-22.

(b) COMPONENTS

The English and Scottish Law Commissions disagreed on the question whether their proposed principle of strict liability should apply to manufacturers of components.[45] The English Law Commission considered that strict liability should rest on the producer of a component, whether or not it was later incorporated into another product by another producer. The Scottish Law Commission, on the other hand, recommended that the liability of the producer of a component should cease upon the incorporation of the component into the other product. The English Law Commission argued that the producer of a component, especially a sophisticated component such as an altimeter or a television tube, is primarily responsible for quality control. The English Law Commission pointed out that it would be wholly unreasonable to expect a cabinet maker, who merely provided the wooden frame in which a television set was housed, to exercise any real control over the quality of the electronic components. The English Law Commission made the further point that the manufacturer should not be relieved from liability merely because the finishing touches were put to the product by another person. In a case where a component was put to an unforeseen or unexpected use, the component manufacturer would have a sufficient defence if he could show that the product was free from "defect". The Scottish Law Commission took the view that duplication or multiplication of liability would lead to unnecessary duplication or multiplication of insurance in relation to the same risk, and that the consequence would be unnecessarily increased prices.

In our opinion, the arguments of the English Law Commission are more persuasive in this case. Under the present law, suppliers of component parts usually would insure against the risk of suits in negligence. In addition, some suppliers may not know for certain that their products may be used as component parts and will insure accordingly. Moreover, we would point out that, even if the supplier of a defective component were to be exempt from direct liability to a person injured, he would still be liable in most cases to answer a claim for indemnity by the manufacturer of the completed product. Consequently, it seems desirable to enable the injured plaintiff to elect to proceed against either the supplier of the defective component, the manufacturer of the completed product, or both, and to leave it to the various suppliers to make their own arrangements for contribution or indemnity.

(c) NATURAL PRODUCTS

The English and Scottish Law Commissions differed also on the applicability of their proposed principle of strict liability to natural products. The English Law Commission took the view that natural products should be included; the Scottish Law Commission, on the other hand, recommended the exclusion of primary agricultural and fishery products. It should be recalled that, with modern techniques, very few, if any, products are consumed in their natural state.[46] The English Law Commission pointed out that foods are commonly processed and often treated with artificial chemicals. This

---

[45] *Ibid.*, paras. 66-82, at pp. 22-26.
[46] *Ibid.*, paras. 83-96, at pp. 26-29.

Commission also pointed out that crops may be grown with artificial fertilizers and treated with herbicides, and that animals and poultry slaughtered for meat may have been fed with artificial chemicals. In addition, the English Law Commission pointed out that producers of so-called natural products are not always small businesses. Moreover, even if they were, in the view of the English Law Commission, this fact was no justification for exemption from liability. In contrast, the Scottish Law Commission took the view that strict liability would place an unfair burden on producers of agricultural and fishery products.

Again, in our view, the position of the English Law Commission is the more persuasive. It is true that defects in agricultural products may be caused by factors that are beyond the producer's control; for example, a farmer may treat his crop with a fertilizer that he has not prepared. This, however, is true of all products, and no special exemption for agricultural or fishery products seems justifiable.

#### (d) CONCLUSION

As we have noted, we recommend that our proposed principle of strict liability should apply to all products, that is, any tangible goods whether or not they are attached to or incorporated into real or personal property.[47] In particular, for reasons that we have mentioned, we do not recommend that pharmaceutical products, component parts or natural products should be exempted from the application of this principle.

### 5. CLASSES OF DEFENDANT

Under the present law, manufacturers may be held liable in negligence and retailers may be held liable for breach of implied warranty.[48] The English and Scottish Law Commissions' proposal applies to "producers".[49] The Law Commissions defined the term "producers" to include manufacturers and the three other classes of business supplier: namely, those who sell products under their brand name as if they themselves had produced them; persons who sell products which do not carry any indication as to the identity of the producer; and, importers of goods. Distributors, wholesalers and retailers were not, however, generally included. The Saskatchewan *Consumer Products Warranties Act, 1977*[50] applies to persons attaching their brand name products, to persons describing themselves as manufacturers, to importers of goods manufactured abroad, and to retailers, but not to other business suppliers such as wholesalers. Section 402A of the American *Restatement (Second) of Torts*, on the other hand, applies to all business suppliers, including manufacturers, importers, wholesalers, distributors, and retailers, as well as those who supply goods by means other than sale.[51] As we have noted, under existing law the wholesaler and other business suppliers in the distributive chain can be made liable indirectly for breach of warranty, each

---

[47]See Draft Bill, s. 1(1)(*c*).

[48]*Supra*, at pp. 30-31.

[49]Footnote 7, *supra*, paras. 99-102, at pp. 29-30. See also *supra*, at pp. 59-61.

[50]S.S. 1976-77, c. 15, discussed *supra*, at pp. 39-41.

[51]*Supra*, at pp. 54-55.

buyer in the chain claiming against his immediate seller.[52] One of the objectives in reforming the law of products liability is to place the liability of all business suppliers on a single rational basis. It would seem logical, therefore, to follow the Restatement and to extend liability to all business suppliers of defective goods. As was suggested above,[53] there is good reason to compel a business supplier of goods to take the risk of finding that the manufacturer is not amenable to suit because he is insolvent, unknown or beyond the jurisdiction. Where the manufacturer is amenable to suit, the ultimate incidence of liability can be brought home to him.

So far in our discussion we have drawn no distinction between a person who supplies products in the course of his business and someone who supplies a product in a non-business context. The English and Scottish Law Commissions briefly considered the possibility of extending their proposed principle of strict liability to the non-business "producer"; for example, the person who sells home-made jam to a neighbour, or the person who sells apples from a tree in his garden. The Law Commissions pointed out that it is not reasonable to expect the casual, non-business seller, who is not negligent, to assume the risk of injuries or to distribute the loss through insurance or otherwise.[54] In the result, the Law Commissions did not favour such an extension. We share this conclusion. The existing law of implied warranties extends only to those selling in the course of business, and, in our opinion, for the reasons mentioned, there is a difference between business and non-business suppliers. Accordingly, we recommend that the proposed principle of strict liability should apply to a person who supplies[55] a product in the course of his business, but it should not apply to a person who supplies a product in a non-business context; however, the proposed principle should apply only in the case of products of a kind that it is that person's business to supply.[56] Not every product supplied by a business person would be caught by this test. The engineering firm that makes an occasional sale of a second-hand typewriter, for example, would not be in the business of supplying typewriters. However, we recommend that a person should be liable under the proposed principle of strict liability notwithstanding that he has not previously supplied products of the same kind as the product supplied, or that he supplied the product for promotional purposes;[57] for example, the soap manufacturer who distributes plastic clothespins, or the manufacturer of cereals who includes plastic toys in cereal packages.

## 6. Classes of Plaintiff

In the previous section, we discussed the persons who should be liable under our proposed principle of strict liability. We now turn to consider

---

[52]*Supra*, at pp. 31 and 36; see also *Kasler and Cohen* v. *Slavouski*, [1928] 1 K.B. 78 and *Biggin & Co. Ltd.* v. *Permanite Ltd. et al.*, [1951] 2 K.B. 314 (C.A.). In addition to liability for breach of warranty, wholesalers and other business suppliers in the distributive chain may also be liable in negligence, although, as we earlier pointed out, they are rarely held liable in practice. See discussion *supra*, at pp. 19 and 31.

[53]*Supra*, at p. 36.

[54]Footnote 7, *supra*, para. 43, at p. 15.

[55]"To supply" is defined in the Draft Bill as meaning "to make available or accessible by sale, gift, bailment or in any other way, and 'supplied', 'supplies' and 'supplier' have corresponding meanings, but a person who transports a product is not by that act alone a supplier": see Draft Bill, s. 1(1)(*d*).

[56]See Draft Bill, ss. 3(1) and 4(1).

[57]See Draft Bill, s. 5.

whether this principle should be available to all those who suffer injury by reason of a defective product, or whether some restriction should be imposed upon the class of potential plaintiffs.

Section 402A of the *Restatement (Second) of Torts* by its terms restricts recovery to a "user or consumer". In our earlier discussion of section 402A, we criticized this restriction;[58] in practice, it has been abandoned by many American courts.[59] There would seem to be no case for restricting the class of person entitled to recover under the proposed principle of strict liability in any way other than by the general tort limitations of proximity and causation. We so recommend.

Our recommendation will necessitate some change in existing law. The recently amended provisions concerning dependants' claims for damages, found in Part V of *The Family Law Reform Act, 1978,* are restricted to situations where a person is injured or killed by the "fault or neglect of another".[60] The proposed principle of strict liability for defective products is not, however, contingent upon fault or neglect. Consequently, while the person injured by a defective product, for example, could take advantage of the proposed principle of strict liability, his dependants would still be required to show negligence. This does not seem to us to be correct. In our view, the principle of Part V should be broadened so as to enable dependants' claims to be founded upon a showing of strict liability. Therefore, we recommend that, where a person is injured or killed under circumstances where the person is entitled under the proposed principle of strict liability to recover damages, or would have been so entitled if not killed, the spouse as defined by Part II of *The Family Law Reform Act, 1978,* children, grandchildren, parents, grandparents, brothers and sisters of the person should be entitled to recover their pecuniary loss resulting from the injury or death from the person from whom the person injured or killed is entitled to recover or would have been entitled if not killed, and to maintain an action for the purpose in a court of competent jurisdiction, and Part V, except subsection 1 of section 60, of *The Family Law Reform Act, 1978* should apply *mutatis mutandis* to any such action.[61]

## 7. Defences

The principle of strict liability that we have earlier recommended is one of strict, not absolute, liability. In other words, liability need not necessarily follow even though the plaintiff proves that a product has caused him harm: the supplier may, nevertheless, be able to establish a defence to the plaintiff's claim. We now turn to consider the defences that should be so available.

---

[58] *Supra*, at p. 55.

[59] *Ibid.*

[60] *The Family Law Reform Act, 1978*, S.O. 1978, c. 2, ss. 60-64. We wish to point out that section 60 of *The Family Law Reform Act, 1978* refers to injury or death caused by the "fault or neglect of another", whereas *The Fatal Accidents Act*, R.S.O. 1970, c. 164 spoke of death caused by a "wrongful act, neglect or default". Therefore, it may well be that section 60 of *The Family Law Reform Act, 1978,* perhaps inadvertently, has narrowed the scope of recovery by dependants.

[61] See Draft Bill, s. 16.

(a) "STATE OF THE ART"

Recently there has been discussion, mostly in the United States, of a "state of the art" defence.[62] By this means, a manufacturer who proves that he has complied with statutory or generally prevailing standards as of the time the products left his hands would have a defence.[63] It should be noted that, under the present law of negligence in Ontario, compliance with such standards, while usually dispelling an allegation of negligence, may not necessarily have this result.[64] Be that as it may, this proposed "state of the art" defence raises two discrete questions: one relates to the point of time at which the standard is to be determined; the other deals with compliance and non-compliance with statutory or generally prevailing standards.

First, as to the temporal element, as was suggested above, it would seem that the appropriate time for judging the standard of a product in a negligence action under present Ontario law is the time at which the product left the manufacturer's hands.[65] There seems to us no reason why the adoption of a principle of strict liability should change the law in this respect. Under the recommended principle of strict liability, the plaintiff would have to show a "defect". Accordingly, the manufacturer who can show that the product was not defective when it left his hands would have an answer to an action under this principle. In our opinion, subsequent improvements in production methods should not increase the manufacturer's liability.

Insofar as the second question is concerned, compliance with statutory or generally prevailing standards in force at the time of distribution may indicate the absence of a defect. It may be noted that the English and Scottish Law Commissions recommended against any special defence based on the "state of the art",[66] and that the Pearson Commission came to the same conclusion.[67] We agree. In our view, it would be unwise to adopt a rule making compliance conclusive, or even *prima facie,* proof of the absence of a defect. Often statutory standards are incomplete, out of date, or are enacted for social purposes other than product safety. At the same time, it would seem advisable to permit the court to take into account all relevant factors in determining the existence or absence of a "defect".

In the case of non-compliance with statutory standards, some jurisdictions, as, for example, Saskatchewan, have enacted a *prima facie* presumption

---

[62]See U.S. Dept. of Commerce, Draft Uniform Product Liability Law, 44 Fed. Reg. 2996 (1979). Section 106(d) provides that evidence that a product conformed to the "state of the art" at the time of manufacture raises a presumption that the product was not defective. This presumption may, however, be rebutted by "clear and convincing evidence".

[63]U.S. Dept. of Commerce, *Interagency Task Force on Product Liability, Final Report* (1978), at pp. VII-33 - VII-37. As we have already pointed out, one of the difficulties in the American jurisdictions, it would seem, has been, or has been perceived to be, control of the jury system: one impression that may be acquired from a reading of the relevant material is that juries may be awarding damages in products liability cases where there was no defect at the time that the product left the manufacturer's hands. This would appear to be a problem more of the conduct of civil litigation than of the framing of a rule of law.

[64]See Fleming, *The Law of Torts* (5th ed., 1977), at pp. 118-19.

[65]*Supra*, at p. 14.

[66]Footnote 7, *supra*, para. 105, at p. 31.

[67]*Royal Commission on Civil Liability and Compensation for Personal Injury* (1978) (Cmnd. 7054), paras. 1258-60, at p. 269.

of defectiveness. After careful consideration, we have reached the conclusion that, on balance, such a provision is neither necessary nor desirable. We have suggested above that compliance with statutory standards should be neither conclusive nor *prima facie* proof of the absence of a defect; to recommend that non-compliance with such standards should be *prima facie* proof of the existence of a defect would seem to result in an imbalance that cannot easily be justified. In any event, we are of the opinion that, if evidence of non-compliance is admissible under the general rules of evidence, the courts are capable of drawing the appropriate conclusions.

Accordingly, the Commission recommends that, in determining whether or not a product is a defective product, any relevant standard established by law may be taken into account. For the reasons mentioned above, we do not recommend the enactment of a provision making evidence of compliance or non-compliance with statutory or generally prevailing standards either conclusive or *prima facie* proof of the absence or existence of a defect.[68]

### (b) ASSUMPTION OF RISK

Another defence that this Commission has considered is the defence of assumption of risk. This defence forms part of the general law of negligence,[69] the principle being that the person who knows the nature and character of the risk that he runs cannot succeed in a claim for damages for injuries suffered as a result of his assumption of risk.

The English and Scottish Law Commissions recommended that the defence of assumption of risk should continue to be available in strict liability cases. They cited the instance of a plaintiff who, knowing the risk of a drug, deliberately assumed that risk.[70] There are other cases that come to mind of plaintiffs who, knowing that a product is dangerous, continue to use the product.[71] In such cases, it would seem that a defence should be available to the manufacturer. As we have stated, strict liability is not the same as absolute liability, and the manufacturer should not be an insurer of the plaintiff's safety. Accordingly, the Commission recommends that the defence of assumption of risk should be available under the proposed principle of strict liability.

### (c) CONTRIBUTORY NEGLIGENCE

At common law, in a negligence action, the contributory negligence of the plaintiff was a complete defence. Legislation, however, has intervened. Under *The Negligence Act*[72] of Ontario, contributory negligence is no longer a complete defence; rather a finding of fault or negligence on the part of the plaintiff that contributed to the damages claimed by him enables the court to apportion damages in proportion to the degree of fault or negligence found against the parties. The English and Scottish Law Commissions recom-

---

[68]See Draft Bill, s. 1(2).

[69]*Supra*, at p. 19.

[70]Footnote 7, *supra*, para. 106, at p. 31.

[71]For example, a person who drives his car knowing that something is wrong with the brakes of the car.

[72]R.S.O. 1970, c. 296, s. 4.

mended that the principle of strict liability that they proposed should be subject to a partial defence in cases of contributory negligence.[73] This is an issue that we also have considered.

It has been argued that a partial defence of contributory negligence is incompatible with strict liability. Since the defendant's liability is not based on negligence, it has been said to be anomalous to reduce the plaintiff's recovery on account of his own negligence. Moreover, it has been argued that, under a regime of strict liability, there is no basis for comparing the negligence of the two parties where the defendant's negligence is, by hypothesis, irrelevant. On the other hand, it is contended that, if the plaintiff is partly responsible for his own injury, there is no reason why the defendant should compensate the plaintiff for all his damages.

The Ontario *Negligence Act* provides the framework for adjusting liability, one that has functioned successfully and that is under consideration in some American jurisdictions.[74] In our opinion, withdrawal of the means to apportion damages would be a retrograde step. It would require courts to make "all or nothing" decisions which might well, in practice, be harmful rather than helpful either to the plaintiff or the defendant in the area of products liability. Therefore, we recommend that, where injury or damage is caused or contributed to partly by a supplier of a defective product or by reliance upon a false statement made by a supplier concerning a product and partly by the fault or neglect of the person suffering the injury or damage, damages should be apportioned in accordance with the degree of the responsibility of each for the injury or damage. Our Draft Bill so provides.[75]

We further recommend that, where it is not practicable to determine the respective degree of responsibility of the supplier and of the person suffering the injury or damage, the parties should be deemed to be equally responsible for the injury or damage suffered, and damages should be apportioned accordingly.[76] This recommendation is similar in effect to section 5 of the Ontario *Negligence Act*.[77]

### (d) CONTRACTING OUT

We now turn to consider the issue whether parties should be at liberty to contract out of the proposed principle of strict liability.

In our opinion, the question of exclusion of liability is closely linked with the scope of recoverable losses. Provincial legislation restricting the use of exemption clauses in consumer sale transactions is now widespread in

---

[73]Footnote 7, *supra*, paras. 107-10, at pp. 31-32.

[74]See, for example, Wade, "Products Liability and Plaintiff's Fault — The Uniform Comparative Fault Act" (1977-78), 29 Mercer L. Rev. 373.

[75]See Draft Bill, s. 6(1).

[76]See Draft Bill, s. 6(2).

[77]R.S.O. 1970, c. 296. Section 5 provides as follows:

> 5. If it is not practicable to determine the respective degree of fault or negligence as between any parties to an action, such parties shall be deemed to be equally at fault or negligent.

Canada.[78] Between business persons, however, and in relation to business loss, exemption clauses are not always unfair or in any way improper.[79] In such cases, exemption clauses are subject to judicial control, now widely recognized to rest on a principle of unconscionability.

It will be recalled that we have recommended that our proposed principle of strict liability should apply to personal injuries, and to damage to property other than that used in the course of carrying on a business, as well as to any economic loss directly consequent thereon; damage to property used in the course of carrying on a business and pure economic loss would not be recoverable. As a result, it seems appropriate to prohibit exclusion of liability. A power to exclude liability by printed notices would, in our view, both largely frustrate the progress of the new principle, and would also be out of keeping with the consumer protection statutes now in force in Ontario and in most other provinces. We find support for our position in the recommendation of the English and Scottish Law Commissions that, in the context of their proposal, exclusion clauses should be void,[80] although it will be recalled that their principle of strict liability was restricted to compensation for personal injuries.

Accordingly, we recommend that any oral or written agreement, notice, statement or provision of any kind purporting to exclude or restrict liability under the proposed principle of strict liability or to limit any remedy available thereunder should be void.[81]

### 8. Contribution and Indemnity

Under the principle of strict liability that we have earlier recommended, the plaintiff will have an option in most cases to bring proceedings against two or more defendants: usually the manufacturer and the retail supplier of the defective product. It can be expected that the plaintiff will choose to sue the most accessible and solvent defendant. The plaintiff's election, however, should not determine the ultimate incidence of liability as among the potential defendants. If, for example, the plaintiff pursues his action and recovers judgment against the retail supplier who sold him the defective product, the retailer in turn should, in our view, have an action against the manufacturer, if the latter was responsible for the defect.

Under existing law, where the retailer is sued, the ultimate burden of liability may be shifted to the manufacturer by a series of warranty claims, but the process may be interrupted by insolvency or by exemption clauses.[82]

---

[78]Ontario: *The Consumer Protection Act*, R.S.O. 1970, c. 82, as amended by S.O. 1971 (Vol. 2), c. 24, s. 2(1); B.C.: *Sale of Goods Act*, R.S.B.C. 1960, c. 344, as amended by S.B.C. 1971, c. 52, s. 1; Saskatchewan: *The Consumer Products Warranties Act, 1977* S.S. 1976-77, c. 15, s. 11. See New Brunswick Dept. of Justice, Law Reform Division, *Third Report of the Consumer Protection Project* (1976), Vol. I, at pp. 5-7 and the 1978 Quebec *Consumer Protection Act*, s. 43.

[79]Where parties of equal bargaining power are contracting, exclusionary provisions, particularly in the case of business buyers and economic losses, may be perfectly reasonable: see Fleming, footnote 64, *supra*, at p. 279.

[80]Footnote 7, *supra*, paras. 111-12, at pp. 32-33.

[81]See Draft Bill, s. 10.

[82]*Supra*, at pp. 31 and 36; see also *Kasler and Cohen* v. *Slavouski*, footnote 52, *supra*; *Biggin & Co. Ltd.* v. *Permanite Ltd. et al.*, footnote 52, *supra*; and see Prosser, "The Assault Upon the Citadel (Strict Liability to the Consumer)" (1959-60), 69 Yale L.J. 1099, at pp. 1123-24.

Moreover, where the liability of the retailer is grounded in contract, the provisions of *The Negligence Act*[83] of Ontario would not be of assistance. Section 2(1) of this Act, which contains the remedies of contribution and indemnity, cannot, it seems, be utilized by a person found liable for breach of contract.[84]

One basic principle behind the right of indemnity is that of unjust enrichment; for example, it is unjust that the manufacturer should be excused from liability in respect of a defective product that he has distributed simply because the plaintiff has elected to sue another potential defendant. Under our recommended principle of strict liability, those primarily responsible for defective products, in the opinion of the Commission, should bear the burden of liability for injuries caused by such products. Where he is in no way responsible for the defect, a retailer held liable for damage caused by a defective product should be entitled to claim complete indemnity from any prior supplier in the chain of distribution. As we have stated, this result may sometimes be achieved under existing Ontario law by a chain of successive actions for breach of warranty. Reliance, however, could not be placed on section 2(1) of the Ontario *Negligence Act,* which would appear to permit contribution and indemnity only where damages have been caused or contributed to by the "fault or neglect" of two or more persons. The reason is that, under our proposed principle of strict liability, liability will no longer be dependent on a showing of fault or neglect.[85] However, granting a right of indemnity specifically limited to suppliers held liable under our Draft Bill would not be sufficient to effect the objective stated above. For example,

---

[83]R.S.O. 1970, c. 296.

[84]Section 2(1), as amended, now provides as follows:

> 2.(1) Where damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent, and, where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves in the absence of any contract express or implied, each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.

The section applies only to tort feasors, and, arguably, only to tort feasors liable in negligence: *Hollebone* v. *Barnard,* [1954] O.R. 236, [1954] 2 D.L.R. 278 (H.C.J.); *Standard International Corp. et al.* v. *Morgan et al.*, [1967] 1 O.R. 328 (S.C. Master). It would seem to have no application to liability in contract: *Giffels Associates Ltd.* v. *Eastern Const. Co. Ltd. et al.* (1978), 84 D.L.R. (3d) 344, at p. 349, 5 C.P.C. 223 (S.C.C.), at p. 232.

It should also be noted that section 3 of *The Negligence Act,* R.S.O. 1970, c. 296, dealing with contribution and indemnity as a result of a settlement, also only applies to tort feasors.

[85]See footnote 84, *supra.* Again, in the case of settlement, it would appear that section 3 of *The Negligence Act* applies only to the tort of negligence. Section 3 provides as follows:

> 3. A tort feasor may recover contribution or indemnity from any other tort feasor who is, or would if sued have been, liable in respect of the damage to any person suffering damage as a result of a tort by settling with the person suffering such damage, and thereafter commencing or continuing action against such other tort feasor, in which event the tort feasor settling the damage shall satisfy the court that the amount of the settlement was reasonable, and in the event that the court finds the amount of the settlement was excessive it may fix the amount at which the claim should have been settled.

under our recommendation relating to the retention of existing rights,[86] liability could be imposed on a supplier, such as a retailer, for breach of warranty as well as under the proposed principle of strict liability. We are of the view that the manner in which an action for damages caused by a defective product is framed should not determine the extent of a supplier's right to indemnity. We, therefore, consider it appropriate to grant a right of indemnity whatever the basis of the supplier's liability and, accordingly, we recommend that a person who is liable, under our Draft Bill or otherwise, for injury or damage caused by a defective product or by reliance upon a false statement made by a supplier concerning a product should be entitled to be indemnified by any prior supplier of the product who would be liable under the Draft Bill for the injury or damage that gave rise to the liability.[87] However, this recommendation must be subject to two qualifications: first, any agreement express or implied to the contrary; and, secondly, the fault or neglect, if any, of the supplier claiming to be entitled to indemnity.[88]

As to the first point, we have recommended earlier that a supplier should not be able to restrict his liability or to limit any remedy available under the proposed principle of strict liability so far as the person actually suffering injury or damage is concerned, whether or not he is also a supplier.[89] However, consistent with a recommendation in our recent *Report on Sale of Goods,*[90] we are of the view that, except where such clauses would be unconscionable, exemption clauses should otherwise be permitted between suppliers.[91]

With respect to the second matter, it should be noted that our discussion to this point has been based on the assumption that the supplier claiming indemnity is in no way responsible for the defect. However, where a product is defective, responsibility for the damage caused by the product may not rest entirely upon any one party. Damage may be caused partly by the supply of a defective product, and partly by the fault of a third person, who may or may not be a supplier of the product. By way of example, reference should be made to *Smith* v. *Inglis Ltd.*[92] In this case, a manufacturer supplied a defective appliance and a third person, who was not a supplier, removed a safety device, an electrical grounding prong, that would have prevented the injury of which the plaintiff complained. In this kind of situation, we are of the opinion that the supplier of the defective product should not bear the entire loss. Accordingly, we recommend that, where injury or damage is caused or

---

[86]See *infra*, at pp. 104-05 for a discussion of the relationship of the proposed principle of strict liability to existing law, and see Draft Bill, s. 11.

[87]See Draft Bill, s. 8.

[88]*Ibid.*

[89]*Supra*, at p. 98.

[90]Ontario Law Reform Commission, *Report on Sale of Goods* (1979), ch. 9, at. pp. 227 ff., and see Draft Bill, ss. 5.16, 5.2.

[91]Consider the following example:

> Assume that A, a manufacturer, sells a defective product to B, a retailer, who in turn sells the product to C, a consumer, who is injured by the product. In our opinion, neither A nor B should be able to exclude or limit their liability to C. However, we do believe that A should be permitted to exclude or limit his liability to B, for example, in the case of a claim for indemnification, but not in the case of a claim for damages for personal injury or damage to property suffered by B.

[92](1978), 25 N.S.R. (2d) 38, 83 D.L.R. (3d) 215 (S.C., App. Div.).

contributed to partly by a supplier of a defective product or by reliance upon a false statement made by a supplier concerning a product and partly by the fault or neglect of another person, whether or not a supplier of the product, for which that other person would be liable to the person suffering the injury or damage, both the supplier and the other person should be jointly and severally liable to the person suffering the injury or damage, but as between themselves, subject to any agreement express or implied, each should contribute to the amount of the damages in accordance with the degree of the responsibility of each for the injury or damage.[93] As in the case of contributory negligence, we further recommend that, where it is not practicable to determine the respective degree of responsibility of the supplier and of the other person, the supplier and the other person should be deemed to be equally responsible for the injury or damage suffered, and each should contribute to the amount of damages accordingly.[94]

Before concluding this section of the Report, we wish to deal with two consequential matters: the right to claim contribution or indemnity in the case of settlement, and the limitation period applicable to claims for contribution or indemnity. Although both of these matters are covered by *The Negligence Act,* it seems, as was pointed out above, that the Act requires a showing of fault or neglect on the part of the defendant. Since the proposed regime of strict liability will not be dependent upon a showing of fault or neglect, the right to claim contribution or indemnity in cases of settlement and the limitation period applicable to claims for contribution or indemnity under this regime must be expressly addressed. We now turn to consider these two matters.

Insofar as the first is concerned, that is, the right to claim contribution or indemnity in cases of settlement, we believe that such a right follows logically from our earlier recommendations concerning contribution and indemnity.[95] Moreover, it should be noted that *The Negligence Act*[96] expressly provides for this right in respect of cases within the purview of this Act. We see no reason why such a right should not also be available under the proposed principle of strict liability. Accordingly, we recommend that a person who settles for a reasonable sum a claim under the Draft Bill for injury or damage caused by a defective product or by reliance upon a false statement made by a supplier concerning a product should be entitled to claim contribution.[97] Similarly, we recommend that a person who settles for a reasonable sum a claim under our Draft Bill or otherwise for injury or damage caused by a defective product or by reliance upon a false statement made by a supplier concerning a product should be entitled to be indemnified by any prior supplier of the product who would be liable under the Draft Bill for the injury or damage that gave rise to the liability.[98] In both cases, if the amount of the settlement is determined to be excessive, the contribution or the indemnity, as the case may be, should be

---

[93]See Draft Bill, s. 7(1).
[94]See Draft Bill, s. 7(2).
[95]*Supra*, at pp. 98-101.
[96]*The Negligence Act,* R.S.O. 1970, c. 296, s. 3, which is set out *supra*, at p. 99, footnote 85.
[97]See Draft Bill, s. 7(3).
[98]See Draft Bill, s. 8.

calculated in accordance with the amount for which the claim should have been settled, and we so recommend.[99]

The second consequential matter concerns the limitation period in respect of claims for contribution and indemnity. Section 9 of *The Negligence Act,* which addresses itself to this problem, provides as follows:

> 9. Where an action is commenced against a tort feasor or where a tort feasor settles with a person who has suffered damage as a result of a tort, within the period of limitation prescribed for the commencement of actions by any relevant statute, no proceedings for contribution or indemnity against another tort feasor are defeated by the operation of any statute limiting the time for the commencement of action against such other tort feasor provided,
>
> (*a*) such proceedings are commenced within one year of the date of the judgment in the action or the settlement, as the case may be; and
>
> (*b*) there has been compliance with any statute requiring notice of claim against such tort feasor.

This provision has given rise to serious difficulties of interpretation[100] and, in order to avoid some of these difficulties, we recommend that proceedings for contribution or for indemnity should not be permitted after the expiration of any limitation period that would bar an action against the person from whom contribution or indemnity is claimed, or after one year after judgment or settlement, whichever is later.[101]

We wish to point out that the Commission intends to undertake a review of the law of contribution, indemnity and contributory negligence as it applies to a number of areas of law, including torts, contracts and trusts. Therefore, the recommendations that we have made in this Report concerning contribution, indemnity and contributory negligence do not preclude a complete review by the Commission of this entire area of the law.

## 9. Civil Procedure

Discussion of the rules of civil procedure is, of course, beyond the scope of this Report. Nevertheless, we are of the view that two procedural topics deserve special mention: namely, the suitability of jury trials and the availability of class actions under the proposed principle of strict liability.

### (a) Jury Trials

Most of the criticism of the current state of American law is directed toward excessive awards by civil injuries.[102] Every proposed solution to the "products liability insurance crisis" in the United States includes an attempt to reduce the size of damage awards. As we have already noted, in another

---

[99]See Draft Bill, ss. 7(3), 8.

[100]See, for example, Cheifetz, "Contribution Claims, Limitation Periods and *The Negligence Act*, R.S.O. 1970, c. 296, s. 9" (1978), 1 Advocates' Quarterly 146.

[101]See Draft Bill, s. 9.

[102]*Supra*, at p. 74 and U.S. Dept. of Commerce, *Interagency Task Force on Product Liability, Final Report* (1978), at pp. I-26 and II-47.

area where there is an insurance crisis in American jurisdictions, namely medical malpractice, high jury awards seem again to be the main cause.[103] The chief reason that no equivalent crisis exists in Canada in either field is, in our view, less frequent use of the civil jury and greater judicial control over jury awards.[104]

Few American critics have objected to the substantive law governing products liability.[105] The objection is rather to juries that, knowing or presuming that the defendant is insured against the loss, seem to depart from legal rules in order to compensate the plaintiff, and compensate him at an extravagant rate. The critics contend that there would be no "products liability insurance crisis" if the law were strictly applied in favour of the defendant, as well as the plaintiff, and if the successful plaintiff recovered only compensation equivalent to his actual loss.

The Commission, on a former occasion, has recommended the abolition of the jury in civil cases, other than those listed in section 59 of *The Judicature Act*.[106] Even without general abolition, a case can be made for excluding jury trials in actions under our proposed principle of strict liability. The American experience to which we have referred cannot be ignored.[107] One of the main purposes of jury trials in civil litigation — some would say the only legitimate purpose — is to enable the ordinary person, chosen at random from the community, to set community standards in negligence cases, where the reasonableness of a defendant's conduct must be determined. Accordingly,

---

[103]*Supra*, at p. 74.

[104]See, for example, the limit suggested by the Supreme Court of Canada in respect of damages for non-pecuniary loss discussed *supra*, at p. 86.

[105]The submissions from the various insurance, industrial and legal studies to the Interagency Task Force on Product Liability, footnote 102, *supra*, show that few suggest restoring negligence as a basis of liability.

[106]Ontario Law Reform Commission, *Report on Administration of Ontario Courts, Part I* (1973), at p. 350. Section 59 of *The Judicature Act*, R.S.O. 1970, c. 228, as amended, provides as follows:

> 59. Actions of libel, slander, malicious arrest, malicious prosecution and false imprisonment shall be tried by a jury, unless the parties in person or by their solicitors or counsel waive such trial.

[107]This experience may not be ignored by insurers. We have already pointed out that there is no necessary reason for the American experience to be repeated in Ontario: *supra*, at pp. 73-78. Nevertheless, introduction of a principle of strict liability might well produce some premium increase among cautious insurers were no changes made to the method of trial. But if assurance can be given that the apparent cause of the American insurance "crisis" would be removed in Ontario, there would seem to be no rational reason for any dramatic increase in insurance rates, as there was no such increase for several years in strict liability jurisdictions in the United States. See *supra*, at p. 78; Note, "Products Liability and Choice of Law" (1964-65), 78 Harv. L. Rev. 1452; and, O'Connell, *Ending Insult to Injury* (1975). The American Interagency Task Force on Product Liability, in general, found that substantial increases in the cost of product liability insurance in all the Task Force's target industries have occurred since 1974, nearly 10 years after the *Restatement (Second) of Torts*; footnote 102, *supra*, at p. xxxvi.

It is true that the recent decisions of the Supreme Court of Canada suggesting a limit of $100,000 for non-pecuniary loss make it most unlikely that seriously injured persons will be overcompensated: see *Andrews et al.* v. *Grand & Toy Alberta Ltd. and Anderson*, footnote 29, *supra*; *Thornton et al.* v. *School District No. 57 (Prince George) et al.*, footnote 29, *supra*; and *Arnold and Arnold* v. *Teno et al.*, footnote 29, *supra*. Compare, *Lindal* v. *Lindal*, footnote 29, *supra*. However, the exclusion of jury trials would add a further important assurance against the possibility of excessive awards.

when negligence is not in issue, as would be the case under the proposed principle of strict liability, the case for jury trials seems much weaker.

Moreover, there is a precedent in Ontario for excluding jury trials in a particular area. Significantly enough, it is precisely the area in which another American insurance crisis exists; that is, medical malpractice.[108] The basis upon which juries are excluded in malpractice cases is, in part, the complexities of the issues likely to be involved.[109] It is suggested, however, that this exclusion is also due in part to the fear of undue favour to an injured plaintiff where the defendant is assumed to be insured against liability.[110] The same fear would seem to justify the exclusion of the jury in products liability cases.

We recommend, therefore, that any action under the proposed principle of strict liability should be tried before a judge without a jury.[111] We recognize that unless the recommendation in our 1973 *Report on Administration of Ontario Courts* is implemented,[112] this recommendation may present problems to a plaintiff who seeks to assert several claims in the same action, the trial of one or more of which may be heard by judge and jury.

### (b) CLASS ACTIONS

Class actions are actions whereby numerous persons having the same interest may either sue or be sued. In Ontario, class actions are authorized by the Rules of Practice.[113] The circumstances in which such actions may now be brought would seem to be somewhat circumscribed, although recent decisions of the Ontario Court of Appeal may have expanded slightly the ambit of the existing rules.[114]

The Commission is engaged at present in a Project on Class Actions. This Project will deal generally with the subject of class actions. The desirability of this procedural vehicle in the area of products liability will be considered during the course of this Project and, therefore, we make no recommendation with respect to class actions in this Report.

## 10. RELATIONSHIP OF PROPOSED PRINCIPLE TO EXISTING LAW

We have recommended that, under our proposed principle of strict liability, damages should be recoverable for personal injuries, for damage to

---

[108]"It is trite to remark that the almost universal practice in medical malpractice suits in Ontario has been to proceed to trial before a judge alone and a jury notice has been struck out almost automatically upon request.": *Law et al.* v. *Woolford et al.* (1976), 2 C.P.C. 197 (Ont. H.C.J.), at p. 197, *per* Osler, J. See also, *Town* v. *Archer et al.* (1902), 4 O.L.R. 383 (K.B.); *Hodgins* v. *Banting* (1906), 12 O.L.R. 117 (H.C.J.); *Gerbracht* v. *Bingham* (1912), 4 O.W.N. 117 (H.C.J.); and, *Mercer et al.* v. *Gray*, [1941] O.R. 127, [1941] 3 D.L.R. 564 (C.A.). And in an action against a dentist for malpractice: *Sweetman* v. *Law* (1923), 23 O.W.N. 502 (H.C.J.).

[109]See, for example, the recent case of *Wenger* v. *Marien* (1977), 78 D.L.R. (3d) 201 (Alta. S.C., T.D.), and also, *York* v. *Lapp et al.* (1967), 65 D.L.R. (2d) 351 (B.C.S.C.). Compare, *Nichols et al.* v. *Gray* (1978), 9 B.C.L.R. 5, 8 C.P.C. 141 (C.A.).

[110]See Prosser, *Handbook of the Law of Torts* (4th ed., 1971), at pp. 549-51.

[111]See Draft Bill, s. 12.

[112]*Supra*, at p. 103 and see footnote 106, *supra*.

[113]Supreme Court of Ontario Rules of Practice, R.R.O. 1970, Reg. 545, Rule 75.

[114]See *Naken et al.* v. *General Motors of Canada Ltd. et al.* (1978), 21 O.R. (2d) 780, 7 C.P.C. 209, (1979), 21 O.R. (2d) 780, at p. 795, 8 C.P.C. 232 (C.A.). The defendant was granted

property other than that used in the course of carrying on a business, and for economic loss directly consequent thereon. Our recommendation raises two questions concerning the relationship between our proposed principle of strict liability and existing law. The first question is the extent to which the proposed principle would result in an overlapping with remedies available under existing law. The second deals with whether existing law should continue in cases where there is such an overlap.

We now turn to consider the first question. In relation to losses that are recoverable under the proposed principle of strict liability, a buyer in privity of contract[115] with his immediate seller, who suffers injury from a defective product, would have an option to sue either for breach of warranty or under this proposed principle.[116] Where the injured party is not in privity with the defendant, he would also have an option.[117] In this situation, however, his option would be to proceed either under the proposed principle of strict liability or in negligence, if this can be established. In either case, the plaintiff would not, of course, be able to recover twice for the same loss, but there is nothing new in permitting alternative causes of action. Our proposed principle of strict liability is not, however, all-embracing. This principle covers neither damage to property used in the course of carrying on a business nor pure economic loss. Losses of these kinds would remain recoverable, if at all, under existing law.

Insofar as the second question is concerned, we wish to point out that, where loss is caused by a defective product, the law of negligence, in the case of personal injuries and damage to property other than that used in the course of carrying on a business, would be largely superseded by the principle of strict liability. However, we are of the opinion that the plaintiff's right to sue for negligence, in cases where recovery is available under this principle, should not be abrogated. There are at least two reasons that support this view. First, no statutory draftsman can be certain that he has covered every case. If a person's right to sue for negligence in a case of damage caused by a defective product were abrogated and the statute giving effect to our recommendations were not comprehensive, the injured person might very well be without a remedy. Secondly, there may be situations where a plaintiff would consider it advantageous to sue both under the proposed principle of strict liability and, alternatively, in negligence. For example, in some cases it may not be clear until discovery whether the injury was caused by a defective product or by the defendant's negligent conduct in dealing with a sound product. In our view, the plaintiff should have the advantage of pleading both causes of action. No prejudice would result to the defendant: if he is liable on both counts, he can only be made to pay once.

The Commission recommends, therefore, that the rights and liabilities created by the Draft Bill should be in addition to rights and liabilities otherwise provided by law.[118]

---

leave to appeal to the Supreme Court of Canada on March 30, 1979: see *General Motors of Canada Ltd.* v. *Naken et al.* (1979), 27 N.R. 269 (S.C.C.).

[115]The buyer will be in privity with the seller, and thus will have the benefit of the contractual warranties. See *supra*, at pp. 26-27.

[116]The liability of the seller, in such circumstances, can be expected to be more or less identical under each of the alternative causes of action; that is, strict liability or breach of warranty. As it is now, the seller of goods in the course of a business is generally strictly liable for damage caused by defects in them. See *supra*, at pp. 23-26.

[117]This problem is discussed in the Commission's 1979 *Report on Sale of Goods*, ch. 10.

[118]See Draft Bill, s. 11.

## CHAPTER 8

# CONFLICT OF LAWS

Commonly, and with increasing frequency in a shrinking world, products liability disputes involve more than one jurisdiction. Goods manufactured in Quebec by a New York-based manufacturer may be distributed in Ontario and sold in Manitoba to a Saskatchewan resident, causing injury to him in Alberta. From this example, three questions arise: when should Ontario courts have jurisdiction over products liability disputes; when should Ontario law be applied to such disputes; and, when should foreign judgments in products liability cases be enforceable in Ontario? A preliminary issue in any discussion of conflict of laws is the characterization of the plaintiff's cause of action. Throughout the ensuing discussion, we assume that the plaintiff's action under our proposed principle of strict liability will sound in tort.

### 1. Jurisdiction

In Ontario, jurisdiction in actions *in personam* is founded upon service of a writ of summons or other originating process upon the defendant.[1] An individual who is present within the jurisdiction can be served personally. In the case of a corporation, any person who, within Ontario, transacts or carries on any of the business of, or any business for, a corporation whose chief place of business is out of Ontario, may be served as the corporation's agent.[2] At common law, when service could not be effected within Ontario, there was, in general, an absence of jurisdiction.[3] However, there has been legislative action and in certain circumstances a plaintiff can serve a defendant with process notwithstanding that the defendant is out of the jurisdiction.[4]

Until 1975, Rule 25(1)(h) of the Ontario Rules of Practice allowed service *ex juris*, with the leave of the court, "where the action is founded on a tort committed within Ontario".[5] This Rule created some difficulty in the products liability context; several cases held that, in the case of goods manufactured outside Ontario, no tort was committed within Ontario even

---

[1]See Castel, *Canadian Conflict of Laws*, Vol. 1 (1975), at pp. 213 ff.; Morris (ed.), *Dicey and Morris on The Conflict of Laws* (9th ed., 1973), at pp. 158 ff.

[2]Supreme Court of Ontario Rules of Practice, R.R.O. 1970, Reg. 545, Rule 23(3). This provision has, however, been restrictively interpreted: see *Murphy* v. *Phoenix Bridge Co. et al.* (1899), 18 P.R. 495 (Ont. C.A.); *Appel* v. *Anchor Insurance and Investment Corporation Ltd.* (1921), 21 O.W.N. 25 (H.C.J.); *Wee-Gee Uranium Mines Ltd.* v. *New York Times Co. et al.*, [1969] 1 O.R. 741 (H.C.J.); *Sarco Can. Ltd.* v. *Pyrotherm Equipment Ltd. et al.*, [1969] 1 O.R. 426 (S.C. Master). See generally Castel, footnote 1, *supra*, at pp. 216-19; Morris, footnote 1, *supra*, at pp. 163-67.

[3]A defendant could, of course, submit to the jurisdiction of the Ontario court. See Castel, footnote 1, *supra*, at pp. 223 ff.; Morris, footnote 1, *supra*, at pp. 167 ff.

[4]Supreme Court of Ontario Rules of Practice, R.R.O. 1970, Reg. 545, Rule 25 as amended. See also Castel, footnote 1, *supra*, at pp. 226 ff.

[5]R.R.O. 1970, Reg. 545.

though injury occurred in the Province.[6] More recent decisions have cast doubt on this analysis.[7] In the important case of *Moran* v. *Pyle National (Canada) Ltd.*,[8] the Supreme Court of Canada held that, where goods manufactured in Ontario caused injury in Saskatchewan, the Saskatchewan court could, under a rule similar to Rule 25(1)(h), grant leave to serve a writ of summons outside the jurisdiction on the basis that a tort had been committed in Saskatchewan. Dickson, J., delivering the judgment of the Court, said:[9]

> Generally speaking, in determining where a tort has been committed, it is unnecessary, and unwise, to have resort to any arbitrary set of rules. The place of acting and the place of harm theories are too arbitrary and inflexible to be recognized in contemporary jurisprudence. In the *Distillers'* case and again in the *Cordova* case a real and substantial connection test was hinted at. Cheshire, 8th ed., 1970, p. 281, has suggested a test very similar to this; the author says that it would not be inappropriate to regard a tort as having occurred in any country substantially affected by the defendant's activities or its consequences and the law of which is likely to have been in the reasonable contemplation of the parties. Applying this test to a case of careless manufacture, the following rule can be formulated: where a foreign defendant carelessly manufactures a product in a foreign jurisdiction which enters into the normal channels of trade and he knows or ought to know both that as a result of his carelessness a consumer may well be injured and it is reasonably foreseeable that the product would be used or consumed where the plaintiff used or consumed it, then the forum in which the plaintiff suffered damage is entitled to exercise judicial jurisdiction over that foreign defendant. This rule recognizes the important interest a state has in injuries suffered by persons within its territory. It recognizes that the purpose of negligence as a tort is to protect against carelessly inflicted injury and thus that the predominating element is damage suffered. By tendering his

---

[6] *Anderson* v. *Nobels Explosive Co.* (1906), 12 O.L.R. 644 (D.C.); *Paul* v. *Chandler & Fisher Ltd.* (1923), 54 O.L.R. 410, [1924] 2 D.L.R. 479 (H.C.J.). See also *Beck* v. *The Willard Chocolate Co. Ltd.* (1924), 57 N.S.R. 246, [1924] 2 D.L.R. 1140 (S.C., App Div.); *George Monro, Ltd.* v. *American Cyanamid and Chemical Corp.*, [1944] K.B. 432 (C.A.); followed in *Abbott-Smith* v. *Governors of University of Toronto et al.* (1964), 49 M.P.R. 329, 45 D.L.R. (2d) 672 (N.S.S.C., App. Div.).

[7] Cases in which it was held that an essential element of the tort had been committed in the jurisdiction: *Bata* v. *Bata*, [1948] W.N. 366 (C.A.) (defamatory letters mailed from Switzerland to England; held: tort committed in England); *Jenner* v. *Sun Oil Co. Ltd. et al.*, [1952] O.R. 240, [1952] 2 D.L.R. 526 (H.C.J.) (defamatory radio broadcast outside Ontario but heard inside Ontario); *Chinese Cultural Centre of Vancouver et al.* v. *Holt et al.* (1978), 8 C.P.C. 274 (B.C.S.C.) (publication of newspaper article in Ontario and republication in B.C.; held: tort committed in B.C.); *Original Blouse Co.* v. *Bruck Mills Ltd.* (1963), 45 W.W.R. 150, 42 D.L.R. (2d) 174 (B.C.S.C.) (fraudulent misrepresentation by defendant in Quebec by telephone and letter to plaintiff in B.C.; held: tort committed in B.C.); and, see also *Diamond* v. *Bank of London and Montreal Ltd.*, [1979] 2 W.L.R. 228, [1978] 1 All E.R. 561 (C.A.). Leave was granted to sue outside the jurisdiction on the grounds that a tort was committed where damage was suffered (New South Wales) in *Distillers Co. (Biochemicals) Ltd.* v. *Thompson*, [1971] A.C. 458 (P.C.).

[8] [1975] 1 S.C.R. 393.

[9] *Ibid.*, at pp. 408-09.

> products in the market place directly or through normal distributive channels, a manufacturer ought to assume the burden of defending those products wherever they cause harm as long as the forum into which the manufacturer is taken is one that he reasonably ought to have had in his contemplation when he so tendered his goods. This is particularly true of dangerously defective goods placed in the interprovincial flow of commerce.

In 1975, the Ontario Rules of Practice for service *ex juris* were amended. An order of the court is no longer required for service out of the jurisdiction. The present Rule 25(1)(g) is based upon the former Rule 25(1)(h): it provides for service out of the jurisdiction "in respect of a tort committed within Ontario". The scope of Rule 25 was, however, extended by a notable innovation contained in Rule 25(1)(h) which provides for service *ex juris* "in respect of damage sustained in Ontario arising from a tort or breach of contract committed elsewhere". It is obvious that Rule 25(1)(h) considerably widens the jurisdiction of the Ontario courts. To complete this legislative picture, reference should also be made to Rule 25(1)(o) which provides that a party may be served out of Ontario where that party is a "necessary or proper party to an action or proceeding properly brought against another person duly served within Ontario". Accordingly, where a product is purchased in Ontario, a purchaser who suffers injury caused by a defect in the product and who brings proceedings against the retail seller, may, it would seem, join the foreign manufacturer as a necessary or proper party.[10]

Notwithstanding the 1975 amendments to Rule 25, one question that has caused the Commission concern is whether the existing position is entirely satisfactory to deal with present day products liability cases. Consider the following example. Assume that an Ontario resident buys or is given an electric razor that has been manufactured in Quebec by a Quebec manufacturer, who distributes this line of products in Ontario. Assume further that the Ontario resident, while travelling in British Columbia, is injured by an electric shock caused by a defect in the razor. On the one hand, if the product had been purchased from a retailer in Ontario, the manufacturer could, it seems, be joined under Rule 25(1)(o) as a necessary or proper party to an action against the Ontario seller. On the other hand, if no such proceedings can be instituted in Ontario — as, for example, where the razor was given to the injured party, where it was purchased in a private sale, or where it was purchased from a business seller outside Ontario — Rule 25(1)(o) would have no application. Accordingly, Rule 25(1)(o) may not always be applicable and, in any event, there seems no good reason to support this indirect process of taking jurisdiction. Why should an injured person who wishes to sue an out-of-province manufacturer be required to proceed against an Ontario retailer in order to bring Rule 25(1)(o) into play? As the examples

---

[10]Supreme Court of Ontario Rules of Practice, R.R.O. 1970, Reg. 545, Rule 25(1)(o) as amended. See, for example, *Jannock Corp. Ltd.* v. *R.T. Tamblyn & Partners Ltd. et al.* (1975), 8 O.R. (2d) 622, 58 D.L.R. (3d) 678 (C.A.). Compare, *Klondike Helicopters* v. *Fairchild Republic Co. et al.* (1979), 8 Alta. L.R. (2d) 396 (S.C., T.D.). It should also be pointed out that the manufacturer, in such a case, could be served out of the jurisdiction by the retailer who seeks "contribution, indemnity or other relief over" under Rule 25(1)(q).

above show, there may be no retailer in Ontario amenable to suit within the Province.

In neither of the fact situations posited could recourse be had to Rule 25(1)(h). The reason is that the injury occurred while the Ontario resident was in British Columbia,[11] and it has been held that consequential damage such as medical expenses, pain and suffering and loss of the amenities of life suffered by an Ontario resident in consequence of an injury abroad are not "damage sustained in Ontario" within the meaning of Rule 25(1)(h).[12] It is possible that subsequent cases may give a wider interpretation to this phrase. It seems, however, unlikely that it will be construed to include personal injuries occurring outside Ontario, for on such a reading, Rule 25(1)(h) would be wide enough, subject to the overriding doctrine of *forum non conveniens,*[13] to cover any person wheresoever injured who chooses to litigate in Ontario.

In the case outlined above of the Ontario resident and the defective electric razor, there are strong links with Ontario. It does not seem right that the Quebec manufacturer who has distributed defective goods in Ontario should escape the jurisdiction of the Ontario courts by the chance circumstance that the plaintiff's injury occurred outside Ontario or that there is no retailer in Ontario amenable to suit, particularly where the product is one specifically designed to be used by travellers.

We have reached the conclusion, therefore, that the present Ontario jurisdiction rules are, by themselves, inadequate to deal with modern products liability cases. In our opinion, these rules need to be supplemented by a provision specifically designed to deal with disputes that arise under our proposed principle of strict liability. We now turn to consider two alternative jurisdictional connecting factors: namely, the residence or habitual residence in Ontario of the plaintiff; and, the carrying on by the defendant of business in Ontario.

As we have stated, the residence, or habitual residence, of the plaintiff in Ontario is one possible jurisdictional connecting factor. The advantage of such a principle would be that an Ontario resident could always, subject to the principle of *forum non conveniens,* sue in Ontario. Three arguments can, however, be marshalled against this view. First, it may be contended that there is no strong reason why an Ontario resident who is injured in France by a product manufactured in France and distributed only in France should be able to sue in Ontario. In other words, the convenience to the plaintiff in such a case would be outweighed by the unfairness to the defendant. Moreover, insurers, in setting premiums, take into account the jurisdictions in which the supplier's product will be distributed.[14] Secondly, it may be argued that

---

[11]Rule 25(1)(h) covers only those claims in respect of damage sustained in Ontario arising from a tort committed elsewhere.

[12]See *Mar et al.* v. *Block* (1976), 13 O.R. (2d) 422, 1 C.P.C. 206 (H.C.J.).

[13]Castel defines the doctrine of *forum conveniens,* or *non-conveniens,* as the court's "discretionary power to decline to exercise jurisdiction over a transitory cause of action when it believes that the action may be more appropriately and justly tried elsewhere": see Castel, footnote 1, *supra,* at p. 22.

[14]The responses which the Commission received to the questionnaire distributed to the members of the Canadian Manufacturers' Association and to the members of the Insurance Bureau of Canada indicate that premiums are higher in respect of products shipped into the United States.

jurisdiction ought not to be dependent upon the plaintiff's residence or habitual residence. Anomalous distinctions could arise between persons similarly injured in the same occurrence because of a difference in their residence or habitual residence. It may, in any event, be argued that access to Ontario courts should not be denied to any person on the basis of lack of provincial "citizenship". Thirdly, we wish to point out that the concept of habitual residence is not well developed in our system of conflict of laws.[15] Presumably, this concept is something less than domicile, but more than residence.[16] While we do not deny that the concept of residence or habitual residence, in some contexts, may be an appropriate jurisdictional connecting factor, for the reasons stated above, we do not recommend the selection of either concept in the area of product liability.

The second jurisdictional connecting factor that we have considered is that of the defendant's carrying on business in Ontario. The concept of "carrying on business" is, of course, capable of different interpretations. In this context, the concept should, in our view, embrace the activity of a manufacturer or other supplier who has acted in any way to further the supply of his product in Ontario.

The Saskatchewan *Consumer Products Warranties Act, 1977*[17] provides that manufacturers and other suppliers who carry on business in Saskatchewan are subject to the jurisdiction of the courts of Saskatchewan. Section 33 of this Act reads as follows:

> 33.(1) Subject to any regulations made by the Lieutenant Governor in Council pursuant to section 37, consumers, persons mentioned in subsection (1) of section 4 and persons mentioned in section 5 who buy or use consumer products in Saskatchewan, and manufacturers, retail sellers or warrantors who carry on business in Saskatchewan, are subject to the provisions of this Act and to the jurisdiction of the courts of Saskatchewan.
>
> (2) For the purpose of this Act, a manufacturer, retail seller or warrantor shall be deemed to carry on business in Saskatchewan if one or more of the following conditions are met:
>
> (*a*) he holds title to land in Saskatchewan or any interest in land in Saskatchewan for the purposes of carrying on business in Saskatchewan;
>
> (*b*) he maintains an office, warehouse or place of business in Saskatchewan;
>
> (*c*) he is licensed or registered under any statute of Saskatchewan entitling him to do business or to sell securities of his own issue;
>
> (*d*) his name and telephone number are listed in a current telephone directory and the telephone is located at a place in

---

[15]See Cavers, " 'Habitual Residence': A Useful Concept?" (1971-72), 21 Am. U. L. Rev. 475.
[16]See Castel, footnote 1, *supra*, at pp. 138-47.
[17]S.S. 1976-77, c. 15, discussed *supra*, at pp. 39-41.

Saskatchewan for the purposes of carrying on business in Saskatchewan;

(*e*) an agent, salesman, representative or other person conducts business in Saskatchewan on his behalf;

(*f*) he directly or indirectly markets consumer products in Saskatchewan; or

(*g*) he otherwise carries on business in Saskatchewan.

We appreciate that views on this matter may differ, but in the opinion of the Commission the activity of a manufacturer or other supplier, who carries on business in the sense that we have described, provides a solid and rational jurisdictional nexus. It would not seem unreasonable to make such a manufacturer or other supplier amenable to the jurisdiction of the Ontario courts. Abuses of the Ontario process by persons who have no substantial connection with Ontario, but who wish simply to institute actions in Ontario, can be controlled by the doctrine of *forum non conveniens.*

Another aspect of this matter remains to be considered. Assume that a manufacturer does carry on business in Ontario and that his products, "type X" electric razors, are manufactured in Manitoba and distributed in Ontario. Consider two illustrations. First, A might purchase in Winnipeg a "type X" electric razor. On arrival in Ontario, A might give this razor to the plaintiff. Secondly, a "type X" electric razor might be purchased by the plaintiff, en route to British Columbia from Ontario, at the Winnipeg airport. As these examples illustrate, the place of purchase or acquisition may be fortuitous and, in our view, should not, by itself, determine the issue of jurisdiction.

The fundamental question seems to us to be one of distribution. In our opinion, the plaintiff should not be required to prove that the very product that caused him injury was purchased or otherwise acquired in Ontario. It should be sufficient to show that identical products of the same manufacturer or supplier were distributed in Ontario as a result of the defendant's activity in carrying on business in Ontario, as we have defined this concept. From the defendant's point of view, the key question would seem to be whether he could foresee that identical products would be distributed in Ontario; if so, he should be aware of the possibility of proceedings being brought in the Ontario courts. It would seem to us that no unfairness would be occasioned to the defendant in so conferring jurisdiction upon the Ontario courts. On the other hand, it may be very inconvenient for the plaintiff to seek relief in some place other than Ontario. Again, we wish to repeat that this jurisdiction would be subject to the doctrine of *forum non conveniens.*

The Commission accordingly recommends that an action should be maintainable under the Draft Bill where apart from the Draft Bill the court would have jurisdiction[18] or where the supplier at the time of the supply of the product carried on business in Ontario, whether or not the product was

---

[18] *Supra*, at pp. 107-10.

purchased or otherwise acquired in Ontario.[19] We further recommend that a supplier of a defective product or a supplier of a product who makes a false statement concerning that product should be deemed to have carried on business in Ontario where the product or identical products supplied by him were available or accessible in Ontario through commercial channels with his consent, express or implied, or where the supplier has acted in any way to further the supply of the product or identical products in Ontario.[20] To remove any doubts about service *ex juris,* we also recommend that any party to an action brought under our proposed principle of strict liability should be capable of being served out of Ontario in the manner prescribed by the rules of court.[21]

## 2. Choice of Law

The question of which law should be applied in products liability cases is even more difficult to resolve satisfactorily than the question of jurisdiction. Choice of law problems assume variations in the internal laws of different jurisdictions: that is, given a completely neutral forum, there would be no need for choice of law rules if the internal laws of all jurisdictions were identical. In the absence of this identity of laws at the domestic level, the ideal solution would be for all jurisdictions to adopt a uniform set of choice of law rules. If this were to happen, there would be universal agreement on the law that should be applied to any particular dispute, and there would be no premium in forum shopping. It seems doubtful, however, that this desirable state of affairs will be achieved in the reasonably near future. The question to which we must, therefore, turn our attention is as follows: in what cases should Ontario courts apply our proposed principle of strict liability?

### (a) The present rule

In Ontario, the present choice of law rule in torts is based on the case of *Phillips* v. *Eyre,*[22] which was decided in 1869. The rule provides that, in the case of a tort committed outside Ontario, before Ontario law will be applied, the tort must be both actionable by Ontario law and not justifiable by the law of the place where the tort was committed. The first branch and the primary requirement of the rule is that of actionability by Ontario law. If this requirement is not satisfied, no action will lie in Ontario, even though the conduct of the defendant may give rise to liability elsewhere.

The second branch of the rule in *Phillips* v. *Eyre* requires that the conduct of the defendant be not justifiable by the law of the place of the tort. In *Machado* v. *Fontes,*[23] the English Court of Appeal established the proposition that "not justifiable" meant not justifiable either by the criminal or civil law, a proposition that has been accepted by the Supreme Court of Canada.[24] On this basis, the requirement will be satisfied where the defendant's conduct gives rise to criminal liability in the place where the tort is

---

[19]See Draft Bill, s. 13.
[20]See Draft Bill, s. 15.
[21]See Draft Bill, s. 13.
[22](1869), L.R. 4 Q.B. 225, affirmed (1870), L.R. 6 Q.B. 1 (Ex. Ch.).
[23][1897] 2 Q.B. 231 (C.A.).
[24]*McLean* v. *Pettigrew,* [1945] S.C.R. 62, [1945] 2 D.L.R. 65.

committed, even though there is no civil liability by the law of that place. This branch of the rule in *Phillips* v. *Eyre* could have important consequences in the area of products liability; for example, a Quebec manufacturer, though not civilly liable by Quebec law for producing defective goods, might be in breach of federal safety standards legislation.[25] Indeed, the New Brunswick *Consumer Product Warranty and Liability Act, 1978*[26] specifically refers to federal safety standards. Section 27(1) provides as follows:

> 27.(1) A supplier of a consumer product that is unreasonably dangerous to person or property because of a defect in design, materials or workmanship is liable to any person who suffers a consumer loss in the Province because of the defect, if the loss was reasonably foreseeable at the time of his supply as liable to result from the defect and
>
> *(a)* he has supplied the consumer product in the Province;
>
> *(b)* he has supplied the consumer product outside the Province but has done something in the Province that contributes to the consumer loss suffered in the Province; or
>
> *(c)* he has supplied the consumer product outside the Province but the defect arose in whole or in part because of his failure to comply with any mandatory federal standards in relation to health or safety, or the defect caused the consumer product to fail to comply with any such standards.

Doubt has been cast, however, on the second branch of the rule in *Phillips* v. *Eyre* by the decision of the House of Lords in *Chaplin* v. *Boys*.[27] In this case, three of the five members of the House of Lords[28] expressed the view that *Machado* v. *Fontes* was wrongly decided, and that a tort should not be civilly actionable in England unless it is also actionable by the civil law of the place of commission. The effect of this decision would be to require the plaintiff to overcome two hurdles: he would have to show that the defendant's conduct was actionable by the civil law of Ontario and by the *lex loci delicti*. However, it should be noted that the three members of the House of Lords who shared this view differed among themselves very radically as to the principle that should replace the rule in *Phillips* v. *Eyre*. In any event, the proposition in *Machado* v. *Fontes* has been accepted by the Supreme Court of Canada.[29]

Application of any interpretation of the rule in *Phillips* v. *Eyre* requires

---

[25] *Supra*, at pp. 28, 47-49. See Ballway, "Products Liability Based Upon Violation of Statutory Standards" (1965-66), 64 Mich. L. Rev. 1388. Part of the difficulty in using federal statutes to found a civil cause of action is the doubt about whether the Parliament of Canada has the power to create a civil cause of action where the legislation depends on the exercise of the criminal law power. See Alexander, "Legislation and the Standard of Care in Negligence" (1964), 42 Can. Bar Rev. 243, at p. 259, where he cites the following: Finkleman, Note (1935), 13 Can. Bar Rev. 517; Note (1941), 19 Can. Bar Rev. 51; Laskin, *Canadian Constitutional Law* (2nd ed., 1960), at pp. 862-65.

[26] S.N.B. 1978, c. C-18.1.

[27] [1971] A.C. 356, [1969] 3 W.L.R. 322, [1969] 2 All E.R. 1085 (H.L.); (*sub nom. Boys* v. *Chaplin*, [1968] 2 Q.B. 11, [1968] 2 W.L.R. 328, [1968] 1 All E.R. 283 (C.A.); [1968] 2 Q.B. 1, [1967] 3 W.L.R. 266, [1967] 2 All E.R. 665).

[28] See the speeches of Lord Hodson, Lord Wilberforce and Lord Guest.

[29] Footnote 24, *supra*.

the court, as a primary step, to determine the situs of the tort, that is, the place where the tort was committed; only if the tort is committed in another jurisdiction will foreign law be relevant. While it may be a straightforward matter to determine the situs of some torts, products liability cases produce situations in which it may be exceedingly difficult to do so. In *Moran* v. *Pyle National (Canada) Ltd.*,[30] a products liability case to which we earlier made reference, Dickson, J., held that a tort could be regarded as being committed in any jurisdiction that the defendant had reason to foresee might be substantially affected by his conduct. This opinion of Dickson, J., was made in a jurisdictional context, and there is authority for the view that this decision has no application to choice of law questions.[31]

The comments of Dickson, J., contained in the portion of the judgment extracted above, that a manufacturer who distributes his products in a jurisdiction ought to assume the burden of defending those products there could, however, be applied equally to the question of choice of law. A manufacturer who distributes his product in Ontario ought to assume the burden not only of defending actions brought against him in Ontario, but also should be prepared to have his liability fixed by Ontario law.[32]

In summary, it seems that the present law is uncertain as to the test to be used to determine the place of the commission of a tort in circumstances where goods manufactured outside the Province cause injury in Ontario. Further, if the situs of the tort is determined to be in another jurisdiction, the law is uncertain whether, and in what circumstances, the defendant will be entitled in Ontario to require the plaintiff to establish actionability not only by the law of Ontario but also by the law of the place of the tort.

### (b) DEVELOPMENTS IN OTHER JURISDICTIONS

Having discussed the present law in Ontario, it might be useful to review

---

[30]Footnote 8, *supra*, and see *supra*, at pp. 108-09.

[31]In *Interprovincial Co-operatives Ltd. and Dryden Chemicals Ltd.* v. *Her Majesty The Queen in right of the Province of Manitoba*, [1976] 1 S.C.R. 477, Pigeon, J., at p. 515, said that the *Moran* decision had no application to choice of law questions. It should be noted, however, that the passage from Cheshire's *Private International Law*, referred to by Dickson, J., in *Moran* and on which he based his view in respect of jurisdiction, was itself concerned with choice of law rules. Cheshire had written:

> Regarded from the standpoint of principle, the determination of the place of the tort for the purposes of the rule in *Phillips* v. *Eyre* is not perhaps difficult. We have already seen that the reason for reference to the *lex loci delicti commissi* is partly because it is the law of the country which is most directly affected by the defendant's allegedly tortious activity and partly in order to give effect to the reasonable expectations of the parties. It would not, therefore, be inappropriate to regard a tort as having occurred in any country which is substantially affected by the defendant's activity or its consequences and the law of which is likely to have been in reasonable contemplation of the parties. If a man shoots across a frontier, the alleged tort could thus be regarded as having occurred in both countries.

See Cheshire, *Private International Law* (8th ed., 1970), at p. 281.

[32]It has been contended that, for the purpose of choice of law it is "essential to identify a single place of tort", and that "a tort cannot be considered to have occurred in more than one jurisdiction": Castel, *Canadian Conflict of Laws*, Vol. 2 (1977), at pp. 635-36. However, it is difficult to see why the plaintiff should not have an option, in certain circumstances, to choose the law more favourable to him and this could be accomplished by holding that, in products liability cases, a tort can be committed in more than one jurisdiction.

briefly developments in other jurisdictions. In this context we refer to the Hague Convention, the American experience and the legislative activity in Saskatchewan and New Brunswick.

(i) *The Hague Convention*

The 1972 Hague Convention on the Law Applicable to Products Liability proposed a uniform set of choice of law rules. A copy of this Convention is attached to this Report as an Appendix.[33] The Convention deals with four connecting factors, namely, the habitual residence of the plaintiff, the principle place of business of the defendant, the place where the product was acquired by the plaintiff, and the place of the injury. Its provisions are fairly complex. Their net effect is that, if certain pairs of connecting factors coincide, they determine the jurisdiction whose internal law is applicable. The following pairs of connecting factors are conclusive:

1. Plaintiff's habitual residence plus defendant's principal place of business.
2. Plaintiff's habitual residence plus place of product acquisition.

If neither of these groupings is present, then the following are determinative:

3. Place of injury plus plaintiff's habitual residence.
4. Place of injury plus defendant's principal place of business.
5. Place of injury plus place of acquisition.

If none of these five coincidences is found, then the plaintiff may elect between the law of the place of injury and the law of the defendant's principal place of business. However, there is an overriding exemption from the application of the law of the plaintiff's habitual residence or the law of the place of injury if the defendant shows that he could not reasonably foresee that the product, or his own products of the same type, would be made available in that jurisdiction through commercial channels. In determining liability, the court may also consider the rules of conduct and safety of the jurisdiction where the product is introduced into the market. There is another overriding exemption which would allow the court to depart from the Convention in case of its incompatability with public policy, presumably of the forum.

From the above, it is evident that the Convention gives great weight to the law of the place of the plaintiff's habitual residence and considerable weight to the law of the defendant's principal place of business. As we mentioned during our discussion of jurisdiction,[34] the concept of habitual residence is not well developed in our system of conflict of laws: habitual residence is something less than domicile, but more than residence. The concept of the defendant's principal place of business seems to be of doubtful utility. Assume that a manufacturer, whose principal place of business is in Quebec, manufactures, distributes and sells a product in Ontario injuring the plaintiff in Ontario. Assume further that the plaintiff is a university student whose

---

[33]See Appendix 5.

[34]*Supra*, at p. 111.

family lives in Montreal. It seems anomalous to deprive a plaintiff of the benefits of Ontario law on the grounds that he may not be an "habitual resident" of Ontario, and that the defendant's principal place of business happens to be in Quebec, the same jurisdiction as the plaintiff's habitual residence, even though the product was not manufactured in Quebec. An Ontario resident similarly injured by the same product in the same occurrence would be treated differently. This sort of anomaly is inevitable if a test of habitual residence is adopted. For these reasons, we do not favour the approach adopted by the Convention.[35]

(ii) *The American Theories*

The American jurisdictions, in recent years, have evolved a bewildering number of choice of law theories. The traditional American view is that the applicable law in torts is the *lex loci delicti*, that is, the law of the place of the tort. Because of the difficulty of determining the place of the tort, this rule has given rise to arbitrary decisions, and, as a result, various other theories have evolved. One such theory is that the law to be applied is that of the jurisdiction where the "centre of gravity" of the occurrence lies.[36] A second theory requires that the interests of the various states involved be weighed and effect given to the most important interest.[37] A third theory involves an attempt to identify the system of law that has the most significant relationship to the dispute.[38] A fourth view is the adoption of "principles of preference" for choosing the applicable law.[39] Another view calls for the court to choose the "better law", usually, in practice, its own.[40]

(iii) *The Saskatchewan Consumer Products Warranties Act, 1977 and the New Brunswick Consumer Product Warranty and Liability Act, 1978*

Another approach to the subject of choice of law in the products liability context can be found in the Saskatchewan *Consumer Products Warranties Act, 1977*[41] and the New Brunswick *Consumer Product*

---

[35]The main purpose of the Convention is uniformity, yet there would seem to be little prospect of its adoption in other Canadian provinces. Moreover, doubt has been expressed as to whether the Convention will be ratified even by those member states whose delegates voted for its approval. See Cavers, "The Proper Law of Producer's Liability" (1977), 26 I.C.L.Q. 703, at p. 726.

[36]This doctrine, developed in the field of contracts in *Auten* v. *Auten*, 308 N.Y. 155, 124 N.E. 2d 99 (1954), was influential in the rejection of the *lex loci delicti* rule in *Babcock* v. *Jackson*, 12 N.Y. 2d 473, 191 N.E. 2d 279 (1963). See also Castel, footnote 32, *supra*, at pp. 603-04.

[37]Castel, footnote 32, *supra*, at pp. 605-06.

[38]American Law Institute, *Restatement (Second) of Conflict of Laws* (1971), s. 145(1). See also Castel, footnote 32, *supra*, at p. 605.

[39]For a discussion of the "principles of preference" applied to the law of torts, see Cavers, *The Choice of Law Process* (1965), at pp. 139-80.

[40]Castel, footnote 32, *supra*, at pp. 608-09. The position taken by the American delegation to the Hague Convention was that the law to be applied should be the law most favourable to the plaintiff. It has also been proposed that the plaintiff should have an option to choose among the laws of three jurisdictions having certain contacts with the dispute, subject to the defendant's ability to foresee that his product would be present in the jurisdiction chosen: see Cavers, "The Proper Law of Producer's Liability" (1977), 26 I.C.L.Q. 703. See also Kühne, "Choice of Law in Products Liability" (1972), 60 Cal. L. Rev. 1.

[41]S.S. 1976-77, c. 15.

*Warranty and Liability Act, 1978*.[42] We have already noted that, under the Saskatchewan Act, manufacturers and suppliers who carry on business in Saskatchewan are subject to the jurisdiction of the courts in Saskatchewan.[43] An identical test is provided for choice of law: that is, manufacturers and other suppliers who carry on business in Saskatchewan are subject to the substantive provisions of the Saskatchewan Act. We think it useful to set out again the provisions of section 33:

> 33.(1) Subject to any regulations made by the Lieutenant Governor in Council pursuant to section 37, consumers, persons mentioned in subsection (1) of section 4 and persons mentioned in section 5 who buy or use consumer products in Saskatchewan, and manufacturers, retail sellers or warrantors who carry on business in Saskatchewan, are subject to the provisions of this Act and to the jurisdiction of the courts of Saskatchewan.
>
> (2) For the purposes of this Act, a manufacturer, retail seller or warrantor shall be deemed to carry on business in Saskatchewan if one or more of the following conditions are met:
>
> (*a*) he holds title to land in Saskatchewan or any interest in land in Saskatchewan for the purposes of carrying on business in Saskatchewan;
>
> (*b*) he maintains an office, warehouse or place of business in Saskatchewan;
>
> (*c*) he is licensed or registered under any statute of Saskatchewan entitling him to do business or to sell securities of his own issue;
>
> (*d*) his name and telephone number are listed in a current telephone directory and the telephone is located at a place in Saskatchewan for the purposes of carrying on business in Saskatchewan;
>
> (*e*) an agent, salesman, representative or other person conducts business in Saskatchewan on his behalf;
>
> (*f*) he directly or indirectly markets consumer products in Saskatchewan; or
>
> (*g*) he otherwise carries on business in Saskatchewan.

The New Brunswick *Consumer Product Warranty and Liability Act, 1978* contains a similar rule based on acts furthering the supply of a product. It should be noted, however, that the New Brunswick Act requires, in addition, the occurrence of a consumer loss within the Province. Section 27(1) and (2) of this Act provides:

> 27.(1) A supplier of a consumer product that is unreasonably dangerous to person or property because of a defect in design, materials or workmanship is liable to any person who suffers a

---

[42]S.N.B. 1978, c. C-18.1. The Act has not yet been proclaimed in force.

[43]*Supra*, at p. 111.

consumer loss in the Province because of the defect, if the loss was reasonably foreseeable at the time of his supply as liable to result from the defect and

*(a)* he has supplied the consumer product in the Province;

*(b)* he has supplied the consumer product outside the Province but has done something in the Province that contributes to the consumer loss suffered in the Province; or

*(c)* he has supplied the consumer product outside the Province but the defect arose in whole or in part because of his failure to comply with any mandatory federal standards in relation to health or safety, or the defect caused the consumer product to fail to comply with any such standards.

(2) For the purposes of paragraph (1)*(b)*, where a person has done anything in the Province to further the supply of any consumer product that is similar in kind to the consumer product that caused the loss, it shall be presumed that he has done something in the Province that contributed to the consumer loss suffered in the Province, unless he proves irrefragably that what he did in the Province did not in any way contribute to that loss.

As we state later in our Report, we support the general approach adopted by these two Acts.

(c) CONCLUSION

Before making our recommendation concerning the choice of law rule that should be adopted for products liability cases under our proposed principle of strict liability, we must first turn our attention to constitutional considerations.

(i) *Constitutional Law*

Section 92.13 of *The British North America Act, 1867*[44] confers upon the provinces exclusive legislative authority in relation to "Property and civil rights in the Province". There is no doubt that the Ontario Legislature has constitutional authority to enact the proposed principle of strict liability for defective products. What is not clear is the extent to which this regime may embrace extra-provincial manufacturers or suppliers.

In *Interprovincial Co-operatives Ltd. and Dryden Chemicals Ltd.* v. *Her Majesty The Queen in right of the Province of Manitoba*,[45] Manitoba legislation purported to impose liability on polluters of certain rivers flowing into Manitoba from Saskatchewan and Ontario, even though the polluters' acts were lawful, and indeed specifically licensed in the Provinces where they occurred. Four members of the Supreme Court of Canada held that the Manitoba legislation was invalid. Pigeon, J., delivering the judgment of Pigeon, Martland and Beetz, JJ., took the view that control

---

[44]30 & 31 Vict., c. 3 (Imp.) and R.S.C. 1970, Appendix II, No. 5.
[45][1976] 1 S.C.R. 477.

of pollution of inter-provincial watercourses was a subject matter reserved for federal legislation, and seemed to hold that damage in Manitoba could not by itself found constitutional power where the polluting acts were done elsewhere. Ritchie, J., the fourth member of the majority, apparently was of the opinion that the rule in *Phillips* v. *Eyre* could not be altered by provincial legislation, and that the legislation in question was invalid because it purported to make actionable in Manitoba that which the defendants had a right to do by Ontario and Saskatchewan law. The dissenting judgment of Laskin, C.J., Judson and Spence, JJ., delivered by Laskin, C.J., held that the damage suffered in Manitoba was by itself sufficient to found Manitoba's legislative authority.

An analogy might be drawn between the *Interprovincial* case and products liability. It might be argued, for example, that just as the Manitoba legislation could not make unlawful conduct that was lawful where undertaken, so the Ontario Legislature could not legislate to impose liability, for example, on a Quebec manufacturer if liability would not also be imposed by Quebec law. The two situations can, however, be distinguished. In the *Interprovincial* case, the defendants were specifically licensed to do what they did, that is, to emit certain amounts of chemical pollution. It is most unlikely that a manufacturer would be specifically licensed to produce products that could be held to be defective. Again, the defendants in *Interprovincial* could not do at all what they were authorized to do without contravening Manitoba law. In other words, if they emitted the pollutants into the rivers, they inevitably flowed into Manitoba. But a manufacturer need not send his goods into Ontario. He, unlike the river polluter, can still carry on his business and exercise the rights allowed to him by his home jurisdiction by directing his products elsewhere than into Ontario. Some of the language used by the majority in the *Interprovincial* case suggests that their main concern was the possibility of Manitoba legislation sterilizing, or putting out of business, a manufacturer whose conduct was perfectly lawful, and, indeed, specifically licensed in his own province.[46]

Moreover, it can be argued that a manufacturer of products, who expressly or impliedly consents to his products being distributed in Ontario, can be said, unlike the river polluter, to be acting within Ontario. We are encouraged in this view by the recent decision of the Supreme Court of Canada in *The Queen* v. *Thomas Equipment Ltd.*[47] The Court in this case, by a majority of 6 to 3, held that the Alberta *Farm Implement Act*[48] applied to an out-of-province supplier of farm implements and, reversing the decision of the Appellate Division of the Supreme Court of Alberta, restored the conviction of the accused for a breach of this Act. The accused, a New Brunswick manufacturer, contrary to section 22(3) of *The Farm Implement Act*, had refused to purchase "all the unused farm implements and attachments thereto, and all unused parts" that had been obtained from it by its Alberta dealer. The agreement for the supply of

---

[46]In particular, one can speculate that Ritchie, J., might have changed his vote, thereby converting the dissenting view into a majority, had the level of pollution not been expressly permitted by the provinces in which the discharge occurred.

[47]May 1, 1979 (unreported).

[48]R.S.A. 1970, c. 136.

farm equipment between Thomas Equipment Ltd. and its Alberta dealer provided, *inter alia*, that the dealer was to be given an exclusive territory for the sale of Thomas' equipment and that Thomas would advertise its products and provide the dealer with suitable advertising literature.

Martland, J., with whom Pigeon, Dickson, Beetz, Estey and Pratte, JJ., concurred,[49] was of the opinion that Thomas' liability arose out of its conduct in Alberta, and stated as follows:

> It had, in Alberta, rendered itself subject to the regulatory provisions of *The Farm Implement Act*. It had failed to comply with those regulations and the penalty imposed upon it was because of that failure. Thomas is not being penalized under the Act for its conduct in New Brunswick, but because of what it failed to do in Alberta. . . . The Alberta statute imposes an obligation upon a vendor who sells farm implements to a dealer in Alberta for resale in Alberta to repurchase those implements which are located in Alberta.

In other words, it would seem that it was Thomas' conscious decision to participate in the Alberta market that formed the basis of its liability.

Support for this view may be derived from the dissenting judgment of Sinclair, J.A., in the Court below, where he made the following statement:

> If a manufacturer wants to have his farm implements sold here he must comply with the rules of the game, as it were, established by the legislature of Alberta.

These remarks of Sinclair, J.A., were quoted by Martland, J., with apparent approval. In our opinion, they are just as applicable to the law of products liability.

One further point may be made. As mentioned above, it may be that at common law a tort can be said to be committed within a jurisdiction if the manufacturer or supplier can foresee that his product will be distributed there.[50] If the tort is committed in Ontario there can be no objection to the application of Ontario law. Surely acts within Ontario can be made actionable by Ontario legislation unless the subject matter can be categorized as inter-provincial in nature and, therefore, within the exclusive jurisdiction of Parliament under section 91.2 of *The British North America Act, 1867* as relating to "The regulation of trade and commerce". In our view, however, the existence of federal power over trade and commerce does not preclude the application of provincial laws aimed at the protection of purchasers against products originating outside the province, although there might be concurrent federal legislative power.

After very careful consideration of this vexed area of the law, the Commission is of the opinion that the Ontario Legislature has the constitutional power to enact a principle of strict liability for defective products that is applicable to extra-provincial manufacturers and suppliers, provided that there is a constitutionally recognized connection with the Province

---

[49]Laskin, C.J., Spence and Ritchie, JJ., were in dissent.

[50]*Supra*, at p. 115.

of Ontario. We have considered various possible connecting factors, and have rejected tests based on occurrence of damage in Ontario and the acquisition of the product in Ontario. We have concluded that constitutional legislative competence can be reliably grounded upon some degree of business activity in the Province that evinces a deliberate choice by the extra-provincial manufacturer or supplier to participate in the Ontario market.[51] While we acknowledge that complete certainty is unattainable, in our opinion, a law that is premised on business activity in the Province would be constitutionally effective to bind an extra-provincial manufacturer or supplier. We are supported in our view by the Saskatchewan and New Brunswick Acts, the relevant provisions of which we earlier extracted.[52]

(ii) *Recommendation*

At the beginning of this section of our Report, we mentioned that the ideal solution to the choice of law problem would be for all jurisdictions to adopt a uniform set of rules, so that there would be universal agreement on the law that should be applied to any particular dispute. The difficulties in reaching universally acceptable choice of law rules appear, however, insurmountable. We have proceeded, therefore, upon a more modest venture, that is, to answer the following question: in what circumstances should an Ontario court apply our proposed principle of strict liability for damage caused by defective products? In our opinion, this principle should be applied in all cases where the manufacturer or supplier of the defective product carries on business in Ontario. Accordingly, we recommend that in an action pursuant to the Draft Bill, the rights and liabilities of a supplier should be governed by the internal law of Ontario where the internal law of Ontario would now be applicable or where the supplier at the time of the supply of the product carried on business in Ontario.[53] As in the case of the jurisdiction of the Ontario courts,[54] we further recommend that a supplier of a defective product or a supplier of a product who makes a false statement concerning that product should be deemed to have carried on business in Ontario where the product or identical products supplied by him were available or accessible in Ontario through commercial channels with his consent, express or implied, or where the supplier has acted in any way to further the supply of the product or identical products in Ontario.[55] As we have discussed, legislative implementation of this recommendation, in our

---

[51]Authority for this position can be found in the taxation cases, which have authorized provincial taxation of out-of-province enterprises where they had a business connection with the province. The leading case is *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575 (P.C.). See also La Forest, *The Allocation of Taxing Power under the Canadian Constitution* (1967), at p. 92; and, *In re Income Tax Act, 1932, and Proctor and Gamble Company of Canada Ltd.*, [1937] 3 W.W.R. 680 (Sask. K.B.). One must be cautious in applying decisions given under the provincial taxing power to other heads of provincial power. However, the reasoning of the taxing decisions on this point seems equally applicable to other kinds of law. Indeed, the reasoning is reinforced by the undoubted principle that persons doing things in a province must comply with the law of that province.

[52]*Supra*, at pp. 118-19.

[53]See Draft Bill, s. 14.

[54]*Supra*, at p. 113.

[55]See Draft Bill, s. 15.

opinion, would be within the constitutional competence of the Ontario Legislature.

This recommendation is similar in substance to the approach adopted by the Saskatchewan *Consumer Products Warranties Act, 1977* and the New Brunswick *Consumer Product Warranty and Liability Act, 1978* to which we have earlier referred.[56] Compared with other proposals, our recommendation has the attraction of simplicity. It would seem to be easy to apply and, in our view, would achieve a reasonably fair and balanced result. Moreover, we would note that our proposed choice of law rule has the merit of coinciding with the jurisdictional rule that we recommended earlier. There is, in our opinion, much to be said for the proposition that a manufacturer or supplier who profits from the Ontario market should be subject to Ontario law. A manufacturer or supplier who wishes to avoid Ontario law has his own recourse: he need not carry on business in Ontario; for example, by sending his products into Ontario.

### 3. Enforcement of Foreign Judgments

The law governing enforcement of foreign judgments is of great practical importance. Ontario's jurisdictional and choice of law rules may enable an injured plaintiff to secure a judgment in Ontario, but if the defendant has no assets in the jurisdiction the judgment may be worthless. Ontario cannot enact valid rules for the enforcement of an Ontario judgment outside the Province. At present, a foreign judgment may be enforced in Ontario either as a matter of common law[57] or under *The Reciprocal Enforcement of Judgments Act*.[58] We note that the Uniform Law Conference of Canada adopted in 1933 a *Uniform Foreign Judgments Act*, which was revised in 1964.[59] To date the Uniform Act has been enacted in only New Brunswick and Saskatchewan.[60] The Commission has some sympathy for the view that the judgments rendered in sister provinces should be enforceable in Ontario, where facts exist that *mutatis mutandis* would have supported the jurisdiction of the Ontario courts. The problem of enforcement of foreign judgments is not, however, unique to the law of products liability; it cuts across all areas of the law. Therefore, we are of the view that it would not be appropriate for us to consider what changes, if any, should be made to the law of Ontario with respect to enforcement of foreign judgments in the area of products liability alone. An examination of the whole of the law of enforcement of foreign judgments is, of course, beyond the scope of this Report.

---

[56]*Supra*, at pp. 117-19.
[57]Castel, footnote 1, *supra*, at pp. 403 ff.
[58]R.S.O. 1970, c. 402.
[59]Uniform Law Conference of Canada, *Proceedings of the Sixtieth Annual Meeting* (1978), Table I.
[60]*Ibid.*, Table III.

## CHAPTER 9

# UNIFORMITY AND MISCELLANEOUS ISSUES

### 1. Uniformity

It should be stressed that products are generally distributed on an inter-provincial or international basis. In our *Report on Sale of Goods*,[1] we noted the importance of inter-provincial sales to Ontario's economy. It would be unfortunate if our recommended principle of strict liability were to create unintended impediments to the free flow of goods between provinces. It would, therefore, seem very desirable that each province should adopt uniform provisions with respect to the law of products liability. We also noted in our *Report on Sale of Goods* that the Uniform Law Conference of Canada has played an active role in sponsoring the drafting of uniform acts in other branches of commercial law. Similar to the position taken in that Report, we recommend that the Uniform Law Conference of Canada should be asked to explore the possibility of a Uniform Products Liability Act.

### 2. Miscellaneous Issues

There are two issues that affect the scope or operation of the Products Liability Act proposed in this Report: first, the applicability of the Act to the Crown; and, secondly, the question of its retrospective or prospective operation.

So far as the first issue is concerned, we recommended in our 1979 *Report on Sale of Goods* that the Crown should be bound by the proposed revised Sale of Goods Act. We see no reason to depart from this view in respect of the law of products liability. Accordingly, and for reasons similar to those stated in our *Report on Sale of Goods*,[2] we recommend that the Crown should be bound by the proposed Products Liability Act.[3]

The problem of retroactivity was also addressed by this Commission in its *Report on Sale of Goods*.[4] In that Report we pointed out that the general rule of construction is that a statute is not retrospective in character. Consequently, unless the proposed Products Liability Act provided otherwise, it would not apply to causes of action arising prior to the Act coming into force. For reasons like those mentioned in the *Report on Sale of Goods*, we are of the opinion that the proposed Act should not be made retroactive since to do so could prejudice unfairly rights and obligations accruing under the older law: suppliers, for example, may well have arranged their affairs on the basis of this law. Accordingly, we recommend that the proposed Products Liability Act should apply only to injury or damage occurring on or after the day on which the Act comes into force.[5]

---

[1]Ontario Law Reform Commission, *Report on Sale of Goods* (1979).
[2]*Ibid.*, at pp. 561-62.
[3]See Draft Bill, s. 2.
[4]Footnote 1, *supra*, at p. 565.
[5]See Draft Bill, s. 17.

# PART V

# SUMMARY OF RECOMMENDATIONS AND CONCLUSION

## SUMMARY OF RECOMMENDATIONS

The Commission makes the following recommendations:

1. Ontario should enact a principle of strict liability in accordance with recommendations 2 and 3 below. (p. 64)

2. A person who supplies a defective product that causes injury should be strictly liable in tort for damages. (p. 64)

3. A person who supplies a product and who makes a false statement concerning the product, reliance upon which causes injury, should be strictly liable in tort for damages, whether or not the reliance is that of the person injured. (p. 65)

4. Subject to recommendation 5, the principle of strict liability proposed in recommendations 2 and 3 should cover personal injury and damage to property, together with economic loss directly consequent thereon. (pp. 81-85)

5. The principle of strict liability proposed in recommendations 2 and 3 should not extend to damage to property used in the course of carrying on a business. (pp. 82, 85)

*6. The principle of strict liability proposed in recommendations 2 and 3 should not extend to pure economic loss. (pp. 84-85)

7. Compensation for injury or damage caused by a defective product or by reliance upon a false statement made by a supplier concerning a product should not be subject to a monetary limit as to either the amount recoverable by any one plaintiff on a given set of facts or the total sum for which a defendant might be liable in respect of any one product or run of products. (p. 86)

8. No special limitation period or cut-off period should be prescribed in respect of actions for the recovery of damages under the proposed principle of strict liability. (pp. 87, 89)

9. The proposed principle of strict liability should apply to all products, that is, any tangible goods whether or not they are attached to or incorporated into real or personal property. (p. 92)

10. The proposed principle of strict liability should apply to a person who supplies a product in the course of his business but only in the case of products of a kind that it is his business to supply; it should not apply to a person who supplies a product in a non-business context. (p. 93)

11. A person should be liable under the proposed principle of strict liability notwithstanding that he has not previously supplied products of the same kind as the product supplied, or that he supplied the product for promotional purposes. (p. 93)

---

*Dr. Derek Mendes da Costa, the Chairman of the Commission, and the Honourable R.A. Bell dissent in part from this recommendation. See *supra*, ch. 7, footnote 23, at pp. 84-85.

12. The class of person entitled to recover under the proposed principle of strict liability should not be restricted in any way other than by the general tort limitations of proximity and causation. (p. 94)

13. In particular, where a person is injured or killed under circumstances where the person is entitled under the proposed principle of strict liability to recover damages, or would have been so entitled if not killed, the spouse as defined by Part II of *The Family Law Reform Act, 1978,* children, grandchildren, parents, grandparents, brothers and sisters of the person should be entitled to recover their pecuniary loss resulting from the injury or death from the person from whom the person injured or killed is entitled to recover or would have been entitled if not killed, and to maintain an action for the purpose in a court of competent jurisdiction, and Part V, except subsection 1 of section 60, of *The Family Law Reform Act, 1978* should apply *mutatis mutandis* to any such action. (p. 94)

14. In determining whether or not a product is a defective product, any relevant standard established by law may be taken into account. (p. 96)

15. The defence of assumption of risk should be available under the proposed principle of strict liability. (p. 96)

16. Where injury or damage is caused or contributed to partly by a supplier of a defective product or by reliance upon a false statement made by a supplier concerning a product and partly by the fault or neglect of the person suffering the injury or damage, damages should be apportioned in accordance with the degree of the responsibility of each for the injury or damage. (p. 97)

17. Where it is not practicable to determine the respective degree of responsibility of the supplier and of the person suffering the injury or damage, the parties should be deemed to be equally responsible for the injury or damage suffered, and damages should be apportioned accordingly. (p. 97)

18. An oral or written agreement, notice, statement or provision of any kind purporting to exclude or restrict liability under recommendations 2 and 3 or to limit any remedy available thereunder should be void. (p. 98)

19. Subject to recommendation 20 and to any agreement express or implied, a person who is liable, under the proposed Products Liability Act or otherwise, for injury or damage caused by a defective product or by reliance upon a false statement made by a supplier concerning a product should be entitled to be indemnified by any prior supplier of the product who would be liable under the proposed Products Liability Act for the injury or damage that gave rise to the liability. (p. 100)

20. Where injury or damage is caused or contributed to partly by a supplier of a defective product or by reliance upon a false statement made by a supplier concerning a product and partly by the fault or neglect of another person, whether or not a supplier of the product, for which that other person would be liable to the person suffering the injury or damage, both the supplier and the other person should be jointly and severally liable to the person suffering the injury or damage, but as between themselves, subject to any agreement express or implied, each should contribute to the

amount of the damages in accordance with the degree of the responsibility of each for the injury or damage. (pp. 100-01)

21. Where it is not practicable to determine the respective degree of responsibility of the supplier and of the other person, the supplier and the other person should be deemed to be equally responsible for the injury or damage suffered, and each should contribute to the amount of damages accordingly. (p. 101)

22. A person who settles for a reasonable sum a claim under the proposed Products Liability Act for injury or damage caused by a defective product or by reliance upon a false statement made by a supplier concerning a product should be entitled to claim contribution in accordance with recommendation 20 and, in the event that the amount of the settlement is determined to be excessive, contribution should be calculated in accordance with the amount for which the claim should have been settled. (pp. 101-02)

23. A person who settles for a reasonable sum a claim under the proposed Products Liability Act or otherwise for injury or damage caused by a defective product or by reliance upon a false statement made by a supplier concerning a product should be entitled to be indemnified by any prior supplier of the product who would be liable under the proposed Products Liability Act for the injury or damage that gave rise to the liability and, in the event that the amount of the settlement is determined to be excessive, the indemnity should be calculated in accordance with the amount for which the claim should have been settled. (pp. 101-02)

24. Proceedings for contribution or for indemnity should not be permitted after the expiration of any limitation period that would bar an action against the person from whom contribution or indemnity is claimed, or after one year after judgment or settlement, whichever is later. (p. 102)

25. Any action under the proposed principle of strict liability should be tried before a judge without a jury. (p. 104)

26. The rights and liabilities created by the proposed Products Liability Act should be in addition to rights and liabilities otherwise provided by law. (p. 105)

27. An action should be maintainable under the proposed Products Liability Act where apart from that Act the court would have jurisdiction or where the supplier at the time of the supply of the product carried on business in Ontario, whether or not the product was purchased or otherwise acquired in Ontario. (pp. 112-13)

28. In an action pursuant to the proposed Products Liability Act, the rights and liabilities of a supplier should be governed by the internal law of Ontario where the internal law of Ontario would now be applicable or where the supplier at the time of the supply of the product carried on business in Ontario. (p. 122)

29. For the purposes of recommendations 27 and 28, a supplier of a defective product or a supplier of a product who makes a false statement concerning that product should be deemed to have carried on business in

Ontario where the product or identical products supplied by him were available or accessible in Ontario through commercial channels with his consent, express or implied, or where the supplier has acted in any way to further the supply of the product or identical products in Ontario. (pp. 113, 122)

30. Any party to an action brought under the proposed Products Liability Act should be capable of being served out of Ontario in the manner prescribed by the rules of court. (p. 113)

31. The Crown should be bound by the proposed Products Liability Act. (p. 125)

32. The proposed Products Liability Act should apply only to injury or damage occurring on or after the day on which the Act comes into force. (p. 125)

33. The Uniform Law Conference of Canada should be asked to explore the possibility of a Uniform Products Liability Act. (p. 125)

## CONCLUSION

This Report embodies the Commission's conclusions concerning the need for reform in this important area of the law, and the direction that this reform should take. In the opinion of the Commission, a rational and equitable law of products liability can be fashioned only by the introduction of a principle of strict liability. Such a principle would substantially eliminate the anomalies and injustices of the existing law of products liability.

The Report undoubtedly focuses upon the legal basis of liability for damages caused by defective products. However, the shift from a negligence regime to a principle of strict liability also necessitated examination of a host of subsidiary issues, including the types of damage compensable under the principle, possible restrictions on this right of recovery and applicable defences. The Report also examines the right to compensation in the case of injuries caused by reliance upon a false statement made by a supplier concerning a product, a subject that the Commission believes to be inextricably related to the law of liability for defective products.

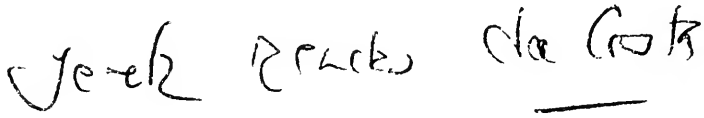
In its review of the law of products liability, the Commission has had the benefit of the opinions of the English and Scottish Law Commissions, as set out in their 1977 Report on *Liability for Defective Products*. During the course of our study, reference has also been made to both American and international developments in the law of products liability. While these legal developments have been carefully considered by the Commission, at all times we have attempted to ensure that the legislation that we propose be suited to the prevailing circumstances in Ontario.

We note that recently there has been significant legislative activity in a number of provinces in the field of products liability. Because of the extra-provincial and international ramifications of changes to the law of products liability, there is a great need to strive for and to achieve uniformity among the various legal jurisdictions within Canada. Therefore, in our view, it is desirable that this subject be considered by the Uniform Law Conference of Canada.

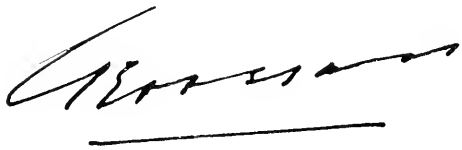
We wish to reiterate our very deep gratitude to Professor S. M. Waddams, Director of the Commission's Products Liability Project. His

scholarship and his devotion, both in time and energy, to this Report are much appreciated. We wish also to record our sincere thanks to Mr. Eric Gertner for his scholarship and patient assistance during the preparation of this Report.

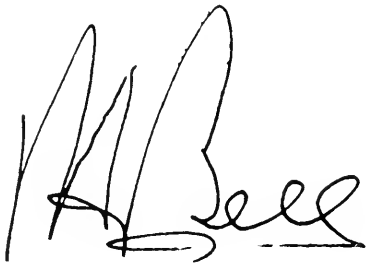
All of which is respectfully submitted,



DEREK MENDES DA COSTA, *Chairman*

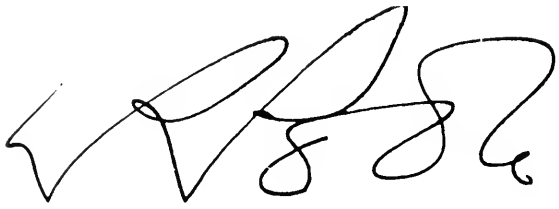


GEORGE A. GALE, *Vice Chairman*



RICHARD A. BELL, *Commissioner*

W. GIBSON GRAY, *Commissioner*



WILLIAM R. POOLE, *Commissioner*

November 16, 1979

## APPENDIX 1

## DRAFT BILL

# An Act to impose Liability on Business Suppliers of Defective Products

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

Interpretation

**1.**—(1) In this Act,

(*a*) "defective product" means a product that falls short of the standard that may reasonably be expected of it in all the circumstances;

(*b*) "false statement" includes any misstatement of fact, whether made by words, pictures, conduct or otherwise;

(*c*) "product" means any tangible goods whether or not they are attached to or incorporated into real or personal property;

(*d*) "to supply" means to make available or accessible by sale, gift, bailment or in any other way, and "supplied", "supplies" and "supplier" have corresponding meanings, but a person who transports a product is not by that act alone a supplier.

Standards established by law

(2) In determining whether or not a product is a defective product, any relevant standard established by law may be taken into account.

Crown bound

**2.** The Crown is bound by this Act.

Strict liability for defective products

**3.**—(1) Where in the course of his business a person supplies a product of a kind that it is his business to supply and the product is a defective product which causes personal injury or damage to property, that person is liable in damages,

(*a*) for the injury or damage so caused; and

(*b*) for any economic loss directly consequent upon such injury or damage.

Exception for business losses

(2) A supplier is not liable under clause *a* or *b* of subsection 1 for damage to property used in the course of carrying on a business.

Strict liability for false statements about products

**4.**—(1) Where in the course of his business a person supplies a product of a kind that it is his business to supply and makes a false statement concerning the product, reliance upon which causes personal injury or damage to property, that person is liable in damages,

(*a*) for the injury or damage so caused; and

(*b*) for any economic loss directly consequent upon such injury or damage,

whether or not the reliance is that of the person suffering the injury or damage.

Exception for business losses

(2) A supplier is not liable under clause *a* or *b* of subsection 1 for damage to property used in the course of carrying on a business.

New business and promotions

**5.** A person may be liable under section 3 or 4 notwithstanding that he has not previously supplied products of the same kind as the product supplied or that he supplied the product for promotional purposes.

Contributory negligence

**6.**—(1) Where injury or damage is caused or contributed to partly by a supplier of a product under section 3 or by reliance upon a false statement made by a supplier concerning a product under section 4 and partly by the fault or neglect of the person suffering the injury or damage, damages shall be apportioned in accordance with the degree of the responsibility of each for the injury or damage.

Where parties deemed equally responsible

(2) Where under subsection 1 it is not practicable to determine the respective degree of responsibility of the supplier and of the person suffering the injury or damage, the parties shall be deemed to be equally responsible for the injury or damage suffered, and damages shall be apportioned accordingly.

Joint tort feasors

**7.**—(1) Where injury or damage is caused or contributed to partly by a supplier of a product under section 3 or by reliance upon a false statement made by a supplier concerning a product under section 4 and partly by the fault or neglect of another person, whether or not a supplier of the product, for which that other person would be liable to the person suffering the injury or damage, both the supplier and the other person are jointly and severally liable to the person suffering the injury or damage, but as between the supplier and the other person, subject to any agreement express or implied, each shall contribute to the amount of the damages in accordance with the degree of the responsibility of each for the injury or damage.

Where parties deemed equally responsible

(2) Where under subsection 1 it is not practicable to determine the respective degree of responsibility of the supplier and of the other person, the supplier and the other person shall be deemed to be equally responsible for the injury or damage suffered, and each shall contribute to the amount of damages accordingly.

Settlement

(3) A person who settles for a reasonable sum a claim for injury or damage under section 3 or 4 is entitled to claim contribution under subsection 1 and, in the event that the amount of the settlement is determined to be excessive, contribution shall be calculated in accordance with the amount for which the claim should have been settled.

Indemnity by prior suppliers

**8.** Subject to section 7 and to any agreement express or implied, a person who is liable or who settles for a reasonable sum a claim under this Act or otherwise for injury or damage caused by a product or by reliance upon a false statement made by a supplier concerning a product is entitled to be indemnified by any prior supplier of the product who would be liable under this Act for the injury or damage that gave rise to the liability and, in the event that the amount of the settlement is determined to be excessive, the indemnity shall be calculated in accordance with the amount for which the claim should have been settled.

Limitation for contribution and indemnity

**9.** Proceedings for contribution under section 7 or for indemnity under section 8 shall not be brought after,

(*a*) the expiration of any limitation period that would bar an action against the person from whom contribution or indemnity is claimed; or

(*b*) one year after judgment or settlement,

whichever is later.

Restriction on liability void

**10.** Any oral or written agreement, notice, statement or provision of any kind purporting to exclude or restrict liability under section 3 or 4 or to limit any remedy thereunder is void.

Other rights not affected

**11.** The rights and liabilities created by this Act are in addition to rights and liabilities otherwise provided by law.

Trial by judge

**12.** Any action under section 3 or 4 shall be tried by a judge without a jury.

Extended jurisdiction

**13.** An action may be brought under this Act where apart from this section the court would have jurisdiction or where the supplier at the time of the supply of the product carried on business in Ontario, and any party to such an action may be served out of Ontario in the manner prescribed by the rules of court.

Choice of law

**14.** In an action under this Act, the rights and liabilities of a supplier are governed by the internal law of Ontario where the internal law of Ontario would apart from this section apply or where the supplier at the time of the supply of the product carried on business in Ontario.

Carrying on business

**15.** A supplier of a defective product or a supplier of a product who makes a false statement concerning that product shall be

deemed to have carried on business in Ontario for the purposes of sections 13 and 14,

(*a*) where the product or identical products supplied by him were available or accessible in Ontario through commercial channels with his consent express or implied; or

(*b*) where the supplier has acted in any way to further the supply of the product or identical products in Ontario.

Rights of dependants

**16.** Where a person is injured or killed under circumstances where the person is entitled under section 3 or 4 to recover damages, or would have been so entitled if not killed, the spouse as defined in Part II of *The Family Law Reform Act, 1978,* children, grandchildren, parents, grandparents, brothers and sisters of the person are entitled to recover their pecuniary loss resulting from the injury or death from the person from whom the person injured or killed is entitled to recover or would have been entitled if not killed, and to maintain an action for the purpose in a court of competent jurisdiction, and Part V, except subsection 1 of section 60, of *The Family Law Reform Act, 1978* applies *mutatis mutandis* to any such action.

1978, c. 2

Application of Act

**17.** This Act applies only to injury or damage occurring on or after the day on which this Act comes into force.

Short title

**18.** The short title of this Act is *The Products Liability Act, 198* .

# APPENDIX 2

## Draft Uniform Product Liability Law
## United States Department of Commerce*

. . . . .

### Uniform Product Liability Act

PREAMBLE

This Act sets forth uniform standards for state product liability tort law. It does not cover all issues that may be litigated in product liability cases; rather, it focuses on those where the need for uniform rules is the greatest. The purpose of these uniform rules is to eliminate existing confusion and uncertainty on the part of both product users and product sellers about their respective legal rights and obligations. Improving the level of certainty as to how state product liability law will deal with claims for injuries caused by allegedly defective products should also, over time, promote greater availability and affordability in product liability insurance and greater stability in rates and premiums.

SEC. 100. SHORT TITLE

This Act shall be known and may be cited as the "Uniform Product Liability Act."

SEC. 101. FINDINGS

(a) Sharply rising product liability insurance premiums have created serious problems in interstate commerce resulting in:

(1) Increased prices of consumer and industrial products;

(2) Disincentives to develop high-risk but potentially beneficial products;

(3) Businesses going without product liability insurance coverage, thus jeopardizing the availability of compensation to injured persons; and

(4) Panic "reform" efforts that would unreasonably curtail the rights of product users.

(b) One cause of these problems is that product liability law is frought [*sic*] with uncertainty; the rules vary from jurisdiction to jurisdiction and are in a constant state of flux, thus militating against predictability of litigation outcome.

(c) Insurers have cited uncertainty in product liability law and litigation outcome as a justification for setting rates and premiums that, in fact, may not reflect actual product risk.

(d) Product liability insurance rates are set on the basis of a countrywide, not an individual state, experience. Thus, individual states can do little to solve the problem because a product manufactured in one state can readily cause injury in any one of the other 49 states or the District of Columbia.

(e) Uncertainty in product liability law and litigation outcome is added to litigation costs and may put an additional strain on the judicial system.

(f) Recently enacted state product liability legislation has widened already existing disparities in the law.

SEC. 102. DEFINITIONS

(1) *Product Seller.*

"Product seller" means any person or entity, including a manufacturer, wholesaler, distributor, or retailer, who is

*44 Fed. Reg. 2996 (1979).

engaged in the business of selling such products, whether the sale is resale, or for use or consumption. The term "product seller" also includes lessors or bailors of products who are engaged in the business of leasing or bailment of products.

(2) *Product Liability Claim.*

"Product liability claim" includes all claims or actions brought for personal injury, death, or property damage caused by the manufacture, construction, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging, or labeling of any product. It includes, but is not limited to, all actions based on the following theories: strict liability in tort; negligence; breach of warranty, express or implied; breach or failure to discharge a duty to warn or instruct, whether negligent or innocent; misrepresentation, concealment, or nondisclosure, whether negligent or innocent; or under any other substantive legal theory in tort or contract.

(3) *Claimant.*

"Claimant" means a person asserting a legal cause of action or claim and, if the claim is asserted on behalf of an estate, claimant includes claimant's decedent. Claimants include product users, consumers, and bystanders who are harmed by defective products.

(4) *Harm.*

"Harm" includes damage to property and personal physical injuries including emotional harm. It includes damage to the product itself. Damage caused by loss of use of a product is not included, but a claim may be allowed if the seller expressly warranted this protection and this warranty was intended to extend to claimant.

(5) *Manufacturer.*

"Manufacturer" includes product sellers who design, assemble, fabricate, construct, process, package, or otherwise prepare a product or component part of a product prior to its sale to a user or consumer. It includes a product seller or entity not otherwise a manufacturer that holds itself out as a manufacturer.

(6) *Reasonably Anticipated Conduct.*

"Reasonably anticipated conduct" means conduct which would be expected of an ordinary prudent person who is likely to use the product.

(7) *Clear and Convincing Evidence.*

"Clear and convincing evidence" is that measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established.

SEC. 103. SCOPE OF THIS ACT

(a) A product liability claim provided by this Act shall be in lieu of all existing claims against product sellers (including actions in negligence, strict liability, and warranty) for harms caused by a product.

(b) A claim may be asserted successfully under this Act even though the claimant did not buy the product from or enter into any contractual relationship with the product seller.

(c) The previously existing applicable state law of product liability is modified only to the extent set forth in this Act.

SEC. 104. THE BASIC STANDARDS OF RESPONSIBILITY

A product seller may be subject to liability for harm caused to a claimant who proves by a preponderance of the

evidence that one or more of the following conditions apply: the product was defective in construction (Subdivision 104A); the product was defective in design (Subdivision 104B); or the product was defective in that adequate warnings or instructions were not provided (Subdivision 104C).

104(A) *The Product Was Defective in Construction.*

The harm was caused because the product was not made in accordance with the product seller's own design or manufacturing standards. In determining whether the product was defective, the trier of fact may consider the product seller's specifications for the product, and any differences in the product from otherwise identical units of the same product line.

104(B) *The Product Was Defective in Design.*

The harm was caused because the product was defective in design. In determining whether the product was defective, the trier of fact shall consider whether an alternative design should have been utilized, in light of:

(1) The likelihood at the time of manufacture that the product would cause the harm suffered by the claimant;

(2) The seriousness of that harm;

(3) The technological feasibility of manufacturing a product designed so as to have prevented claimant's harm;

(4) The relative costs of producing, distributing, and selling such an alternative design; and

(5) The new or additional harms that may result from such an alternative design.

104(C) *The Product Was Defective Because Adequate Warnings or Instructions Were Not Provided.*

The harm was caused because the product seller failed to provide adequate warnings or instructions about the dangers and proper use of the product.

(1) In determining whether adequate instructions or warnings were provided, the trier of fact shall consider:

(a) The likelihood at the time of manufacture that the product would cause the harm suffered by the claimant;

(b) The seriousness of that harm;

(c) The product seller's ability to anticipate at the time of manufacture that the expected product user would be aware of the product risk, and the nature of the potential harm; and

(d) The technological feasibility and cost of warnings and instructions.

(2) In claims based on Section 104(C), the claimant shall prove that if adequate warnings or instructions had been provided, a reasonably prudent person would not have suffered the harm.

(3) A product seller may not be considered to have provided adequate warnings or instructions unless they were devised to communicate with the person(s) best able to take precautions against the potential harm.

SEC. 105. UNAVOIDABLY UNSAFE ASPECTS OF PRODUCTS

(a) An unavoidably unsafe aspect of a product is that aspect incapable of being made safe in light of the state of scientific and technological knowledge at the time of manufacture.

(b) A product seller may be subject to liability for failing to provide an adequate warning or instruction about an unavoidably unsafe aspect of the seller's product, if the factors set forth in Section 104, subdivision (C) indicate that such warnings or instructions should have been given. This obligation to warn or instruct may arise after the time the product is manufactured.

(c) If Section 104(C) is not applicable, the product seller shall not be subject to liability for harm caused by an un-

avoidably unsafe aspect of a product unless the seller has expressly warranted by words or actions that the product is free of such unsafe aspects.

SEC. 106. RELEVANCE OF THE "STATE OF THE ART" AND INDUSTRY CUSTOM

(a) For the purposes of this section, "state of the art" means the safety, technical, mechanical, and scientific knowledge in existence and reasonably feasible for use at the time of manufacture.

(b) Evidence of changes in a product design, in the "state of the art," or in the custom of the product seller's industry occurring after the product was manufactured is not admissible for the purpose of proving that the product was defective in design under Section 104(B), or that a warning or instruction should have accompanied the product at the time of manufacture under Section 104(C). The evidence may be admitted for other purposes if its probative value outweighs its prejudicial effect.

(c) Evidence of custom in the product seller's industry is generally admissible. The product seller's compliance or noncompliance with custom may be considered by the trier of fact in determining whether a product was defective in design under Section 104(C), or whether there was a failure to warn or instruct adequately under Section 104(C).

(d) Evidence that a product conformed to the "state of the art" at the time of manufacture, raises a presumption that the product was not defective within the meaning of Sections 104(B) and (C). This presumption may be rebutted by clear and convincing evidence that in light of the factors set forth in Section 104(B) and (C), the product was defective.

(e) A product seller may by a motion request the court to determine whether the injury-causing aspect of the product conformed to a non-governmental safety standard having the following characteristics:

(1) It was developed through careful, thorough product testing and a formal product safety evaluation;

(2) Consumer as well as manufacturer interests were considered in formulating the standard;

(3) It was considered more than a minimum safety standard at the time of its development; and

(4) The standard was up-to-date in light of the technological and scientific knowledge reasonably available at the time the product was manufactured.

If the court makes such a determination in the affirmative, it shall instruct the trier of fact to presume that the product was not defective. This presumption may be rebutted by clear and convincing evidence that in light of the factors set forth in Sections 104(B) and (C), the product was defective.

SEC. 107. RELEVANCE OF COMPLIANCE WITH LEGISLATIVE OR ADMINISTRATIVE STANDARDS

(a) A product seller may by a motion request the court to determine whether the injury-causing aspect of the product conformed to an administrative or legislative standard having the following characteristics:

(1) It was developed as a result of careful, thorough product testing and a formal product safety evaluation;

(2) Consumer as well as manufacturer interests were considered in formulating the standard;

(3) The agency responsible for enforcement of the standard considered it to be more than a minimum safety standard at the time of its promulgation; and

(4) The standard was up-to-date in light of the technological and scientific knowledge reasonably available at the time the product was manufactured.

(b) If the court makes such a determination in the affirmative, it shall

instruct the trier of fact to presume that the product was not defective. This presumption may be rebutted by clear and convincing evidence that in light of the factors set forth in Section 104 (B) and (C), the product was defective.

SEC. 108. NOTICE OF POSSIBLE CLAIM REQUIRED

(a) An attorney who anticipates filing a claim under this Act shall present a notice of this claim stating the time, place and circumstances of events giving rise to the claim along with an estimate of compensation or other relief to be sought.

(b) This notice shall be given within six months of the date of entering into an attorney-client relationship with the claimant in regard to the claim. For the purposes of this Act, such a relationship arises when the attorney, or any member or associate of the attorney's firm, agrees to serve the claimant's interests in regard to the anticipated claim. Notice shall be given to all persons or entities against whom the claim is likely to be made.

(c) Any product seller who receives notice pursuant to subsection (a) promptly shall furnish claimant's attorney with the names and addresses of all persons the product seller knows to be in the chain of manufacture and distribution, if requested to do so by the attorney at the time the notice is given. Any product seller who fails to furnish such information shall be subject to liability as provided for in subsection (e).

(d) A claimant who delays entering into an attorney-client relationship to delay unreasonably the notice required by subsection (a) shall be subject to liability as provided in subsection (e).

(e) Any person who suffers monetary loss because of the failure of a claimant or his attorney or of a product seller in the chain of manufacture and distribution to comply with the requirements of this section may recover damages, costs, and reasonable attorneys' fees from that party. Failure to comply with the requirements of this section does not affect the validity of any claim or defense under this Act.

SEC. 109. LENGTH OF TIME PRODUCT SELLERS ARE SUBJECT TO LIABILITY FOR HARM CAUSED BY THEIR PRODUCTS

(A) Useful Safe Life.

(1) A product seller may be liable to a claimant for harm caused by the seller's product during the useful safe life of that product. "Useful safe life" refers to the time during which the product reasonably can be expected to perform in a safe manner. In determining whether a product's useful safe life has expired, the trier of fact may consider:

(a) The effect on the product of wear and tear or deterioration from natural causes;

(b) The effect of climatic and other local conditions in which the product was used;

(c) The policy of the user and similar users as to repairs, renewals and replacements;

(d) Representations, instructions and warnings made by the product seller about the product's useful safe life; and

(e) Any modification or alteration of the product by a user or third party.

(2) A product seller shall not be liable for injuries or damage caused by a product beyond its useful safe life unless the seller has so expressly warranted.

(B) Statutes of Repose.

(1) Workplace Injuries.

(a) A claimant entitled to compensation under a state worker compensation statute may bring a product liability claim under this Act for harm that occurs within ten (10) years after delivery of the completed product to its first purchaser or lessee who was not engaged in the business of selling products of that type.

Where this Act precludes a worker from bringing a claim because of subdivision (1)(a), but the worker can prove, by the preponderance of evidence, that the product causing the injury was unsafe, the worker may bring a claim against the workplace employer. If possible, the claim should be brought in a worker compensation proceeding, and shall include all loss of wages that otherwise would not be compensated under the applicable worker compensation statute.

(c) Where this Act precludes a worker's beneficiaries under an applicable wrongful death statute from bringing a wrongful death claim because of subdivision (1)(a), but they can prove, by a preponderance of evidence, that the product that caused the worker's death was unsafe, they may bring a claim against the workplace employer. If possible, the claim must be brought in a Worker Compensation proceeding, and shall include pecuniary losses that would not have otherwise been compensated under the applicable worker compensation statute.

(d) An employer who is subject to liability under either subsection (1)(b) or (c) shall have the right to seek contribution from the product seller in an arbitration proceeding under Section 116 of this Act. Contribution shall be limited to the extent that the product seller is responsible for the harm incurred under the principles of Section 104 of this Act. The final judgment in that proceeding shall not be subject to trial *de novo*, but shall be treated as a final judgment of a trial court.

(2) Non-Workplace Injuries.

For product liability claims not included in subdivision (B) that involve harms occurring more than ten (10) years after delivery of the completed product to its first purchaser or lessee who was not engaged in the business of selling products of that type, the presumption is that the product has been utilized beyond its useful safe life as established by subdivision (A). This presumption may be rebutted by clear and convincing evidence.

(3) Limitations on Statutes of Repose.

(a) Where a product seller expressly warrants or promises that the seller's product can be utilized safely for a period longer than ten (10) years, the period of repose shall be extended according to these warranties or promises.

(b) The ten (10) year period of repose established in Section 109(B) does not apply if the product seller intentionally misrepresents a product, or fraudulently conceals information about it, where that conduct was a substantial cause of the claimant's harm.

(c) Nothing contained in Section 109 (B) shall affect the right of any person found liable under this Act to seek and obtain contribution or indemnity from any other person who is responsible for harm under this Act.

(d) The ten (10) year period of repose established in Section 109(B) does not apply if the harm was caused by prolonged exposure to a defective product, or if an injury-causing aspect of the product existing at the time it was sold did not manifest itself until ten years after the time of its first use.

(C) Statute of Limitations.

All claims under this Act shall be brought within three years of the time the claimant discovered, or in the exercise of due diligence should have discovered, the facts giving rise to the claim.

### SEC. 110. RELEVANCE OF THIRD-PARTY ALTERATION OR MODIFICATION OF A PRODUCT

(a) A product seller shall not be liable for harm that would not have occurred but for the fact that his product was altered or modified by a third party unless:

(1) The alteration or modification was in accordance with the product seller's instructions or specifications;

(2) The alteration or modification was made with the express consent of the product seller; or

(3) The alteration or modification was the result of conduct that reasonably should have been anticipated by the product seller.

(b) For the purposes of this section, alteration or modification includes changes in the design, formula, function, or use of the product from that originally designed, tested or intended by the product seller. It includes failure to observe routine care and maintenance, but does not include ordinary wear and tear.

SEC. 111. RELEVANCE OF CONDUCT ON THE PART OF PRODUCT LIABILITY CLAIMANTS

(a) General Rule.

In any claim under this Act, the comparative responsibility of, or attributed to, the claimant, shall not bar recovery but shall diminish the award of compensatory damages proportionately, according to the measure of responsibility attributed to the claimant.

(b) Apportionment of Damages.

In any claim involving comparative responsibility, the court, unless otherwise requested by all parties, shall instruct the jury to give answers to special interrogatories, or the court shall make its own findings if there is no jury, indicating—

(1) The amount of damages each claimant would have received if comparative responsibility were disregarded, and

(2) The percentage of responsibility allocated to each party, including the claimant, as compared with the combined responsibility of all parties to the action. For this purpose, the court may decide that it is appropriate to treat two or more persons as a single party.

(3) In determining the percentage of responsibility, the trier of fact shall consider, on a comparative basis, both the nature and quality of the conduct of the party.

(4) The court shall determine the award for each claimant according to these findings and shall enter judgment against parties liable on the basis of the common law joint and several liability of joint tortfeasors. The judgment shall also specify the proportionate amount of damages allocated against each party liable, according to the percentage of responsibility established for that party.

(5) Upon a motion made not later than one year after judgment is entered, the court shall determine whether all or part of a party's share of the obligation is uncollectible from that party, and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault. A party whose liability is reallocated is still to be subject to contribution and to any continuing liability to the claimant on the judgment.

(c) Conduct Affecting Claimant's Responsibility.

(1) Failure to Discover a Defective Condition.

(i) A claimant is not required to have inspected the product for defective condition. Failure to have done so does not render the claimant responsible for the harm caused.

(ii) Where a claimant using a product is injured by a defective condition that would have been apparent to an ordinary prudent person, the claimant's damages are subject to reduction according to the principles of subsections (a) and (b).

(2) Using a Product With a Known Defective Condition.

(i) A claimant who knew about a product's defective condition, but who voluntarily and unreasonably used the product, shall be held solely responsible for injuries caused by that defective condition.

(ii) In circumstances where a claimant knew about a product's defective condition and voluntarily used the product, but where the reasonableness of doing so was uncertain, claimant's damages shall be subject to reduction according to the principles of subsections (a) and (b).

(3) Misuse of a Product.

(i) Where a claimant has misused a product by using it in a manner that the product seller could not have reasonably anticipated, the claimant's damages shall be reduced according to the principles of subsections (a) and (b).

(ii) Where the injury would not have occurred but for the misuse defined in subsection (3)(i), the product is not defective for purposes of liability under this Act.

SEC. 112. MULTIPLE DEFENDANTS: CONTRIBUTION AND IMPLIED INDEMNITY

(a) Rights of contribution and implied indemnity among multiple defendants shall be determined by reference to the principles of Section 111 (a & b).

(b) If the proportionate responsibility of the parties to a claim for contribution has been established previously by the court, as provided in Section 111, a party paying more than its share of the obligation, upon motion, may recover judgment for contribution.

(c) If the proportionate responsibility of the parties to the claim for contribution has not been established by the court, contribution may be enforced in a separate action, whether or not a judgment has been rendered against either the person seeking contribution or the person from whom contribution is being sought.

(d) Contribution is available to a person who enters into a settlement with a claimant only: (1) if the liability of the person against whom contribution is sought has been extinguished, and (2) to the extent that the amount paid in settlement was reasonable.

(e) If a judgment has been rendered, the action for contribution must be brought within one (1) year after the judgment becomes final. If no judgment has been rendered, the person bringing the action for contribution either must have: (1) discharged by payment the common liability within the period of the statute of limitations or repose applicable to the claimant's right of action against him and commenced the action for contribution within one year after payment, or (2) agreed while action was pending to discharge the common liability and, within one year after the agreement, have paid the liability and brought an action for contribution.

SEC. 113. THE RELATIONSHIP BETWEEN PRODUCT LIABILITY AND WORKER COMPENSATION

In the case of any claim brought under this Act by or on behalf of a person who has been or will be compensated for injuries under a state worker compensation law, where an employer's failure to comply with any statutory or common law duty relating to workplace safety contributed to the claimant's injuries, the employer shall be subject to a contribution claim as provided in Section 112 of this Act for a sum not to exceed the amount of the worker compensation lien.

SEC. 114. THE INDIVIDUAL RESPONSIBILITY OF PRODUCT SELLERS OTHER THAN MANUFACTURERS AS COMPARED TO OTHER PRODUCT SELLERS

(a) Manufacturers shall be responsible for defective conditions in their products according to the provisions of this Act. In the absence of express warrantees to the contrary, other product sellers shall not be subject to liability in circumstances where they do not have a reasonable opportunity to inspect the product in a manner which would or should, in the exercise of reasonable care, reveal the existence of the defective condition.

(b) The duty limitation of subsection (a) shall not apply, however, if:

(1) The manufacturer is not subject to service of process in the claimant's own state;

(2) The manufacturer has been judicially declared insolvent;

(3) The court determines that the claimant would have appreciable dif-

ficulty enforcing a judgment against the product manufacturer.

SEC. 115. SANCTIONS AGAINST THE BRINGING OF FRIVOLOUS CLAIMS AND DEFENSES

(a) After final judgment has been entered under this Act, either party, by motion, may seek reimbursement for reasonable attorneys' fees and other costs that would not have been expended but for the fact that the opposing party pursued a claim or defense that was frivolous.

(b) For the purposes of this Act, a claim or defense is considered frivolous if the court determines that it was without any reasonable legal or factual basis.

(c) If the court decides in favor of a party seeking redress under this section, it shall do so on the basis of clear and convincing evidence. In all motions under this section, the court shall make and publish its findings of fact.

(d) The motion provided for in subsection (a) may be filed and the claim assessed against the person who was responsible for the frivolous nature of the claim or defense.

(e) In situations where a claimant has been represented on a contingent fee basis and no legal costs have been or will be incurred by that claimant, the attorney for claimant may recover reasonable attorneys' fees based on the amount of time expended in opposing a frivolous defense.

(f) Claims for damages under this section shall not include expenses of persons not parties to the action.

SEC. 116. ARBITRATION

(a) Applicability.

In any claim brought under this Act where the amount in dispute is less than $30,000, exclusive of interest and costs, and the court determines in its discretion that any non-monetary claims are insubstantial, either party may by a motion institute a pre-trial arbitration proceeding.

(b) Rules Governing.

(1) The substantive rules of a Section 116 arbitration proceeding shall be those contained in this Act as well as those in applicable state law.

(2) The procedural rules of a Section 116 arbitration proceeding shall be those contained in this section. If this section does not address a particular issue, guidance may be obtained from the Uniform Arbitration Act.

(3) A legislatively designated state agency may formulate additional procedural rules under this Act.

(c) Arbitrators.

(1) Unless the parties agree otherwise, the arbitration shall be conducted by three persons, one of whom shall be either an active member of the state bar or a retired judge of a court of record in the state, one shall be an individual who possesses expertise in the subject matter area that is in dispute, and one shall be a lay person.

(2) Arbitrators shall be selected in accordance with applicable state law in a manner which will assure fairness and lack of bias.

(d) Arbitrators' Powers.

(1) Arbitrators to whom claims are referred pursuant to Section 116 shall have the power within the territorial jurisdiction of the court, to conduct arbitration hearings and make awards consistent with the provisions of this Act.

(2) State laws applicable to subpoenas for attendance of witnesses and the production of documentary evidence shall apply in procedures conducted under this chapter. Arbitrators shall have the power to administer oaths and affirmations.

(e) Commencement.

The arbitration hearings shall commence not later than 30 days after the claim is referred to arbitration, unless for good cause shown the court shall extend the period. Hearings shall be

concluded promptly. The court may order the time and places of the arbitration.

(f) Evidence.

(1) The Federal Rules of Evidence [or designated state evidence code] may be used as guides to the admissibility of evidence in an arbitration hearing.

(2) Strict adherence to the rules of evidence, apart from relevant state rules of privileges, is not required.

(g) Transcript of Proceeding.

A party may have a recording and transcript made of the arbitration hearing at its own expense. A party that has had a transcript or tape recording made shall furnish a copy of the transcript or tape recording at cost to any other party upon request.

(h) Arbitration Award and Judgment.

The arbitration award shall be filed with the court promptly after the hearing is concluded and shall be entered as the judgment of the court after the time for requesting a trial *de novo* has expired, unless a party demands a trial *de novo* before the court pursuant to subsection (i). The judgment so entered shall be subject to the same provisions of law, and shall have the same force and effect as a judgment of the court in a civil action, except that it shall not be subject to appeal.

(i) Trial *De Novo*.

(1) Within 20 days after the filing of an arbitration award with the court, any party may demand a trial *de novo* in that court.

(2) Upon demand for a trial *de novo*, the action shall be placed on the calendar of the court and treated for all purposes as if it had not been referred to arbitration. Any right of trial by jury that a party would otherwise have shall be preserved inviolate.

(3) At the trial *de novo*, the court shall not admit evidence that there had been an arbitration proceeding, the nature or amount of the award, or any matter concerning the conduct of the arbitration proceeding, except that the testimony given at the arbitration hearing may be used for impeachment purposes at a trial *de novo*.

(4) A party who has demanded a trial *de novo* but fails to obtain a judgment in the trial court, exclusive of interest and cost, more favorable than the arbitration award, shall be assessed the cost of the arbitration proceeding, including the amount of the arbitration fees, and—

(i) If this party is a claimant and the arbitration award is in its favor, the party shall pay to the court an amount equivalent to interest on the arbitration award from the time it was filed; or

(ii) If this party is a product seller, it shall pay interest to the claimant on the arbitration award from the time it was filed.

### SEC. 117. EXPERT TESTIMONY

(a) Appointment.

The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of its own selection. An expert witness shall not be appointed by the court unless he or she consents to act. An expert witness appointed by the court shall be informed of his or her duties in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. An expert witness so appointed shall advise the parties of any findings; shall be available for deposition by any party; and may be called to testify by the court or any party. The court appointed expert witness shall be subject to cross-examination by each party, including a party calling that expert as a witness.

(b) Compensation.

(1) Expert witnesses appointed by the court are entitled to reasonable compensation in whatever amount the court may allow. The court, in its discretion, may

tax the costs of such expert on one party or apportion them between both parties in the same manner as other costs.

(2) In exercising this discretion, the court may consider:

(i) Which party won the case;

(ii) Whether the amount of damages recovered in the action bore a reasonable relationship to the amount sought by the claimant or conceded to be appropriate by the product seller.

(c) Disclosure of Appointment.

In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court has appointed the expert witness.

(d) Parties' Experts of Own Selection.

Nothing in this section limits the parties in calling expert witnesses of their own selection.

(e) Pre-Trial Evaluation of Experts.

The court in its discretion may conduct a hearing to determine the qualification of proposed expert witnesses. The court may order a hearing on its own motion or on the motion of either party.

(1) Need for Pre-Trial Evaluation.

In determining whether to grant such a motion, the court shall consider:

(i) The complexity of the issues in the case; and

(ii) Whether the hearing would deter the presentation of witnesses who are not qualified as experts on the specific issues.

(2) Factors in Evaluation.

If the court decides to hold such a hearing, it shall consider:

(i) The scope of the proposed witness' background and skills;

(ii) The formal and self-education the proposed witness has undertaken relevant to the instant case or similar cases; and

(iii) The proposed witness' potential bias.

(3) Findings of Fact.

In making a determination that a proposed expert witness is or is not qualified, the court shall state its findings of fact.

SEC. 118. NON-PECUNIARY DAMAGES

(a) Non-pecuniary damages, including "pain and suffering," shall be determined by the trier of fact. The court shall have the power to review such damage awards.

(b) In cases where the claimant has not suffered permanent serious disfigurement, permanent impairment of bodily function, or permanent mental illness as a result of the product-related harm, non-pecuniary damages shall be limited to $25,000.

SEC. 119. THE COLLATERAL SOURCE RULE

In any claim brought under this Act, the claimant's recovery shall be diminished by any amount he or she has received or will receive in compensation for the same damages from a public source. This provision shall also apply to parties who may be subrogated to the claimant's rights under this Act.

SEC. 120. PUNITIVE DAMAGES

(a) Punitive damages may be awarded if the claimant shows by clear and convincing evidence that the harm suffered was the result of the product seller's reckless disregard for the safety of product users, consumers, or bystanders who might be injured by the product.

(b) If the trier of fact determines that punitive damages should be awarded, the court shall determine the amount of those damages. In making this determination, the court shall consider:

(1) The likelihood at the time of manufacture that a serious harm would arise from the product seller's misconduct;

(2) The degree of the product seller's awareness of that likelihood;

(3) The profitability of the misconduct

to the product seller;

(4) The duration of the misconduct and any concealment of it by the product seller;

(5) The attitude and conduct of the product seller upon discovery of the misconduct;

(6) The financial condition of the product seller; and

(7) The total effect of other punishment imposed or likely to be imposed upon the product seller as a result of the misconduct, including punitive damage awards to persons similarly situated to claimant and the severity of criminal penalties to which the product seller has been or may be subjected.

SEC. 121. EFFECTIVE DATE

This Act shall be effective with regard to all claims accruing on or after September 1, 1979.

## APPENDIX 3

### Strasbourg Convention on Products Liability In Regard To Personal Injury and Death

**Preamble**

The member States of the Council of Europe, signatory hereto;

Considering that the aim of the Council of Europe is to achieve a greater unity between its Members;

Considering the development of case law in the majority of member States extending liability of producers prompted by a desire to protect consumers taking into account the new production techniques and marketing and sales methods;

Desiring to ensure better protection of the public and, at the same time, to take producers' legitimate interests into account;

Considering that priority should be given to compensation for personal injury and death;

Aware of the importance of introducing special rules on the liability of producers at European level;

Have agreed as follows:

**Article 1**

1. Each Contracting State shall make its national law conform with the provisions of this Convention not later than the date of the entry into force of the Convention in respect of that State.

2. Each Contracting State shall communicate to the Secretary General of the Council of Europe, not later than the date of the entry into force of the Convention in respect of that State, any text adopted or a statement of the contents of the existing law which it relies on to implement the Convention.

**Article 2**

For the purpose of this Convention:

*a.* the term "product" indicates all movables, natural or industrial, whether raw or manufactured, even though incorporated into another movable or into an immovable;

*b.* the term "producer" indicates the manufacturers of finished products or of component parts and the producers of natural products;

*c.* a product has a "defect" when it does not provide the safety which a person is entitled to expect, having regard to all the circumstances including the presentation of the product;

*d.* a product has been "put into circulation" when the producer has delivered it to another person.

**Article 3**

1. The producer shall be liable to pay compensation for death or personal injuries caused by a defect in his product.

2. Any person who has imported a product for putting it into circulation in the course of a business and any person who has presented a product as his product by causing his name, trademark or other distinguishing feature to appear on the product, shall be deemed to be producers for the purpose of this Convention and shall be liable as such.

3. When the product does not indicate the identity of any of the persons liable under paragraphs 1 and 2 of this Article, each supplier shall be deemed to be a producer for the purpose of this Convention and liable as such, unless he discloses, within a reasonable time, at the request of the claimant, the identity of the producer or of the person who supplied him with the product. The same shall apply, in the case of an imported product, if this product does not indicate the identity of the importer referred to in paragraph 2, even if the name of the producer is indicated.

4. In the case of damage caused by a defect in a product incorporated into another product, the producer of the incorporated product and the producer incorporating that product shall be liable.

5. Where several persons are liable under this Convention for the same damage, each shall be liable in full (*in solidum*).

**Article 4**

1. If the injured person or the person entitled to claim compensation has by his own fault contributed to the damage, the compensation may be reduced or disallowed having regard to all the circumstances.

2. The same shall apply if a person, for whom the injured person or the person entitled to claim compensation is responsible under national law, has contributed to the damage by his fault.

**Article 5**

1. A producer shall not be liable under this Convention if he proves:

   *a.* that the product has not been put into circulation by him; or

   *b.* that, having regard to the circumstances, it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation by him or that this defect came into being afterwards; or

   *c.* that the product was neither manufactured for sale, hire or any other form of distribution for the economic purposes of the producer nor manufactured or distributed in the course of his business.

2. The liability of a producer shall not be reduced when the damage is caused both by a defect in the product and by the act or omission of a third party.

**Article 6**

Proceedings for the recovery of the damages shall be subject to a limitation period of three years from the day the claimant became aware or should reasonably have been aware of the damage, the defect and the identity of the producer.

**Article 7**

The right to compensation under this Convention against a producer shall be extinguished if an action is not brought within ten years from the date on which the producer put into circulation the individual product which caused the damage.

**Article 8**

The liability of the producer under this Convention cannot be excluded or limited by any exemption or exoneration clause.

**Article 9**

This Convention shall not apply to:

*a.* the liability of producers *inter se* and their rights of recourse against third parties;

*b.* nuclear damage.

**Article 10**

Contracting States shall not adopt rules derogating from this Convention, even if these rules are more favourable to the victim.

**Article 11**

States may replace the liability of the producer, in a principal or subsidiary way, wholly or in part, in a general way, or for certain risks only, by the liability of a guarantee fund or other form of collective guarantee, provided that the victim shall receive protection at least equivalent to the protection he would have had under the liability scheme provided for by this Convention.

**Article 12**

This Convention shall not affect any rights which a person suffering damage may have according to the ordinary rules of the law of contractual and extra-contractual liability including any rules concerning the duties of a seller who sells goods in the course of his business.

**Article 13**

1. This Convention shall be open to signature by the member States of the Council of Europe. It shall be subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

2. This Convention shall enter into force on the first day of the month following the expiration of a period of six months after the date of deposit of the third instrument of ratification, acceptance or approval.

3. In respect of a signatory State ratifying, accepting or approving subsequently, the Convention shall come into force on the first day of the month following the expiration of a period of six months after the date of the deposit of its instrument of ratification, acceptance or approval.

**Article 14**

1. After the entry into force of this Convention, the Committee of Ministers of the Council of Europe may invite any non-member State to accede thereto.

2. Such accession shall be effected by depositing with the Secretary General of the Council of Europe an instrument of accession which shall take effect on the first day of the month following the expiration of a period of six months after the date of its deposit.

**Article 15**

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories to which this Convention shall apply.

2. Any State may, when depositing its instrument of ratification, acceptance, approval or accession or at any later date, by declaration addressed to the Secretary General of the Council of Europe, extend this Convention to any other territory or territories specified in the declaration and for whose international relations it is responsible or on whose behalf it is authorised to give undertakings.

3. Any declaration made in pursuance of the preceding paragraph may, in respect of any territory mentioned in such declaration, be withdrawn by means of a notification addressed to the Secretary General of the Council of Europe. Such withdrawal shall take effect on the first day of the month following the expiration of a period of six months after the date of receipt by the Secretary General of the Council of Europe of the declaration of withdrawal.

**Article 16**

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, or at any later date, by notification addressed to the Secretary General of the Council of Europe, declare that, in pursuance of an international agreement to which it is a Party it will not consider imports from one or more specified States also Parties to that agreement as imports for the purpose of paragraphs 2 and 3 of Article 3; in this case the person importing the product into any of these States from another State shall be deemed to be an importer for all the States Parties to this agreement.

2. Any declaration made in pursuance of the preceding paragraph may be withdrawn by means of a notification addressed to the Secretary General of the Council of Europe. Such withdrawal shall take effect the first day of the month following the expiration of a period of one month after the date of

receipt by the Secretary General of the Council of Europe of the declaration of withdrawal.

**Article 17**

1. No reservation shall be made to the provisions of this Convention except those mentioned in the Annex to this Convention.

2. The Contracting State which has made one of the reservations mentioned in the Annex to this Convention may withdraw it by means of a declaration addressed to the Secretary General of the Council of Europe which shall become effective the first day of the month following the expiration of a period of one month after the date of its receipt by the Secretary General.

**Article 18**

1. Any Contracting State may, in so far as it is concerned, denounce this Convention by means of a notification addressed to the Secretary General of the Council of Europe.

2. Such denunciation shall take effect on the first day of the month following the expiration of a period of six months after the date of receipt by the Secretary General of such notification.

**Article 19**

The Secretary General of the Council of Europe shall notify the member States of the Council and any State which has acceded to this Convention of:

*a.* any signature;

*b.* any deposit of an instrument of ratification, acceptance, approval or accession;

*c.* any date of entry into force of this Convention in accordance with Article 13 thereof;

*d.* any reservation made in pursuance of the provisions of Article 17, paragraph 1;

*e.* withdrawal of any reservation carried out in pursuance of the provisions of Article 17, paragraph 2;

*f.* any communication or notification received in pursuance of the provisions of Article 1, paragraph 2, Article 15, paragraphs 2 and 3 and Article 16, paragraphs 1 and 2;

*g.* any notification received in pursuance of the provisions of Article 18 and the date on which denunciation takes effect.

In witness whereof, the undersigned, being duly authorised thereto, have signed this Convention.

Done at Strasbourg this 27th day of January 1977, in English and in French, both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies of each of the signatory and acceding States.

## APPENDIX 4

### European Economic Community Draft Directive

### Proposal for a Council Directive relating to the Approximation of the Laws, Regulations and Administrative Provisions of the Member States concerning Liability for Defective Products

*(Presented by the Commission to the Council on 9 September 1976)*

The Council of the European Communities,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100 thereof,

Having regard to the proposal from the Commission,
Having regard to the Opinion of the European Parliament,
Having regard to the Opinion of the Economic and Social Committee,

Whereas the approximation of the laws of the Member States concerning the liability of the producer for damage caused by the defectiveness of his products is necessary, because the divergencies may distort competition in the common market; whereas the rules on liability which vary in severity lead to differing costs for industry in the various Member States and in particular for producers in different Member States who are in competition with one another;

Whereas approximation is also necessary because the free movement of goods within the common market may be influenced by divergencies in laws; whereas decisions as to where goods are sold should be based on economic and not legal considerations;

Whereas, lastly, approximation is necessary because the consumer is protected against damage caused to his health and property by a defective product either in differing degrees or in most cases not at all, according to the conditions which govern the liability of the producer under the individual laws of Member States; whereas to this extent therefore a common market for consumers does not as yet exist;

Whereas an equal and adequate protection of the consumer can be achieved only through the introduction of liability irrespective of fault on the part of the producer of the article which was defective and caused the damage; whereas any other type of liability imposes on the injured party almost insurmountable difficulties of proof or does not cover the important causes of damage;

Whereas liability on the part of the producer irrespective of fault ensures an appropriate solution to this problem in an age of increasing technicality, because he can include the expenditure which he incurs to

cover this liability in his production costs when calculating the price and therefore divide it among all consumers of products which are of the same type but free from defects;

Whereas liability cannot be excluded for those products which at the time when the producer put them into circulation could not have been regarded as defective according to the state of science and technology ("development risks"), since otherwise the consumer would be subjected without protection to the risk that the defectiveness of a product is discovered only during use;

Whereas liability should extend only to moveables; whereas in the interest of the consumer it nevertheless should cover all types of moveables, including therefore agricultural produce and craft products; whereas it should also apply to moveables which are used in the construction of buildings or are installed in buildings;

Whereas the protection of the consumer requires that all producers involved in the production process should be made liable, in so far as their finished product or component part or any raw material supplied by them was defective; whereas for the same reason liability should extend to persons who market a product bearing their name, trademark or other distinguishing feature, to dealers who do not reveal the identity of producers known only to them, and to importers of products manufactured outside the European Community;

Whereas where several persons are liable, the protection of the consumer requires that the injured person should be able to sue each one for full compensation for the damage, but any right of recourse enjoyed in certain circumstances against other producers by the person paying such compensation shall be governed by the laws of the individual Member States;

Whereas to protect the person and property of the consumer, it is necessary, in determining the defectiveness of a product, to concentrate not on the fact that it is unfit for use but on the fact that it is unsafe; whereas this can only be a question of safety which objectively one is entitled to expect;

Whereas the producer is not liable where the defective product was put into circulation against his will or where it became defective only after he had put it into circulation and accordingly the defect did not originate in the production process; the presumption nevertheless is to the contrary unless he furnishes proof as to the exonerating circumstances;

Whereas in order to protect both the health and the private property of the consumer, damage to property is included as damage for which compensation is payable in addition to compensation for death and personal injury; whereas compensation for damage to property should nevertheless be limited to goods which are not used for commercial purposes;

Whereas compensation for damage caused in the business sector remains to be governed by the laws of the individual States;

Whereas the assessment of whether there exists a causal connection

between the defect and the damage in any particular case is left to the law of each Member State;

Whereas since the liability of the producer is made independent of fault, it is necessary to limit the amount of liability; whereas unlimited liability means that the risk of damage cannot be calculated and can be insured against only at high cost;

Whereas since the possible extent of damage usually differs according to whether it is personal injury or damage to property, different limits should be imposed on the amount of liability; whereas in the case of personal injury the need for the damage to be calculable is met where an overall limit to liability is provided for; whereas the stipulated limit of 25 million European units of account covers most of the mass claims and provides in individual cases, which in practice are the most important, for unlimited liability; whereas in the case of the extremely rare mass claims which together exceed this sum and may therefore be classed as major disasters, there might be under certain circumstances assistance from the public;

Whereas in the much more frequent cases of damage to property, however, it is appropriate to provide for a limitation of liability in any particular case, since only through such a limitation can the liability of the producer be calculated; whereas the maximum amount is based on an estimated average of private assets in a typical case; whereas since this private property includes moveable and immoveable property, although the two are usually by the nature of things of different value, different amounts of liability should be provided for;

Whereas the limitation of compensation for damage to property, to damage to or destruction of private assets, avoids the danger that this liability becomes limitless; whereas it is therefore not necessary to provide for an overall limit in addition to the limits to liability in individual cases;

Whereas by Decision 3289/75/ECSC of 18 December 1975[1] the Commission, with the assent of the Council, defined a European unit of account which reflects the average variation in value of the currencies of the Member States of the Community;

Whereas the movement recorded in the economic and monetary situation in the Community justifies a periodical review of the ceilings fixed by the directive;

Whereas a uniform period of limitation for the bringing of action for compensation in respect of the damage caused is in the interest both of consumers and of industry; it appeared appropriate to provide for a three year period;

Whereas since products age in the course of time, higher safety standards are developed and the state of science and technology progresses, it

---

[1]OJ L 327 of 19.12.1975. Also the Council Decision of 21.4.1975 on the definition and conversion of the European unit of account used for expressing the amounts of aid mentioned in Article 42 of the ACP-EEC Convention of Lomé, OJ L 104 of 24.4.1975.

would be unreasonable to make the producer liable for an unlimited period for the defectiveness of his products; whereas therefore the liability should be limited to a reasonable length of time; whereas this period of time cannot be restricted or interrupted under laws of the Member States, whereas this is without prejudice to claims pending at law;

Whereas to achieve balanced and adequate protection of consumers no derogation as regards the liability of the producer should be permitted;

Whereas under the laws of the Member States an injured party may have a claim for damages based on grounds other than those provided for in this directive; whereas since these provisions also serve to attain the objective of an adequate protection of consumers, they remain unaffected;

Whereas since liability for nuclear damage is already subject in all Member States to adequate special rules, it has been possible to exclude damage of this type from the scope of the directive,

Has adopted this Directive:

**Article 1**

The producer of an article shall be liable for damage caused by a defect in the article, whether or not he knew or could have known of the defect.

The producer shall be liable even if the article could not have been regarded as defective in the light of the scientific and technological development at the time when he put the article into circulation.

**Article 2**

"Producer" means the producer of the finished article, the producer of any material or component, and any person who, by putting his name, trademark, or other distinguishing feature on the article, represents himself as its producer. Where the producer of the article cannot be identified, each supplier of the article shall be treated as its producer unless he informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the article.

Any person who imports into the European Community an article for resale or similar purpose shall be treated as its producer.

**Article 3**

Where two or more persons are liable in respect of the same damage, they shall be liable jointly and severally.

**Article 4**

A product is defective when it does not provide for persons or property the safety which a person is entitled to expect.

**Article 5**

The producer shall not be liable if he proves that he did not put the article into circulation or that it was not defective when he put it into circulation.

**Article 6**

For the purpose of Article 1 "damage" means:

(*a*) death or personal injuries;

(*b*) damage to or destruction of any item of property other than the defective article itself where the item of property

(i) is of a type ordinarily acquired for private use or consumption; and

(ii) was not acquired or used by the claimant for the purpose of his trade, business or profession.

**Article 7**

The total liability of the producer provided for in this directive for all personal injuries caused by identical articles having the same defect shall be limited to 25 million European units of account (EUA).

The liability of the producer provided for by this directive in respect of damage to property shall be limited *per capita*
—in the case of moveable property to 15 000 EUA, and

—in the case of immoveable property to 50 000 EUA.

The European unit of account (EUA) is as defined by Commission Decision 3289/75/ECSC of 18 December 1975.

The equivalent in national currency shall be determined by applying the conversion rate prevailing on the day preceding the date on which the amount of compensation is finally fixed.

The Council shall, on a proposal from the Commission, examine every three years and, if necessary, revise the amounts specified in EUA in this Article, having regard to economic and monetary movement in the Community.

**Article 8**

A limitation period of three years shall apply to proceedings for the recovery of damages as provided for in this directive. The limitation period shall begin to run on the day the injured person became aware, or should reasonably have become aware of the damage, the defect and the identity of the producer.

The laws of Member States regulating suspension or interruption of the period shall not be affected by this directive.

**Article 9**

The liability of a producer shall be extinguished upon the expiry of ten years from the end of the calendar year in which the defective article was put into circulation by the producer, unless the injured person has in the meantime instituted proceedings against the producer.

**Article 10**

Liability as provided for in this directive may not be excluded or limited.

**Article 11**

Claims in respect of injury or damage caused by defective articles based on grounds other than that provided for in this directive shall not be affected.

**Article 12**

This directive does not apply to injury or damage arising from nuclear accidents.

**Article 13**

Member States shall bring into force the provisions necessary to comply with this directive within eighteen months and shall forthwith inform the Commission thereof.

**Article 14**

Member States shall communicate to the Commission the text of the main provisions of internal law which they subsequently adopt in the field covered by this directive.

**Article 15**

This directive is addressed to the Member States.

**Explanatory Memorandum**

1. Defective products can lead to extensive personal injuries to, or even the death of, anyone using or consuming the product. They may cause damage to property and that damage may be seriously detrimental to economic interests. The legal position of the injured person varies under the legal systems of the Member States. Whereas some laws provide for compensation in respect of this damage, in so far as they impose liability on the person who produced the defective product, even where fault does not exist or cannot be proved, others require the injured person to prove fault on the part of the producer. It is extremely difficult or even impossible to provide this proof. Under these laws, the injured person then has to bear the damage alone. He is unprotected in such a case.

These divergencies in laws directly affect the establishment or functioning of the common market in different ways, and must therefore be removed.[2]

They may distort competition on the common market. Liability rules imposed on producers of defective products which vary in strictness lead to differences in costs for the economies of the various Member States and in particular for producers in various Member States who are in competition with each other.

Where a producer is liable irrespective of fault, the damage suffered by the user of the defective article is passed on to him. The compensation paid forms part of the general production costs of the product. This increase in costs is reflected in the pricing. The damage is thus, from an economic point of view,

---

[2]Article 100 of the EEC Treaty.

spread over all the products which are free from defects. Before any claims are made, the producer will make allowance for possible compensation payments, and form a reserve or attempt to cover himself by effecting insurance. Where, however, the producer is liable only where he is guilty of fault to be proved by the injured person the same costs do not exist. The difficulty or indeed impossibility of supplying proof usually safeguards the producer from claims.

These differences in costs lead to differing situations with regard to competition. The existence of equal conditions of competition for all producers in the Community is a precondition for the establishment and functioning of a common market. Differences in costs leading to unequal conditions of competition must be removed by approximation of the differing liability provisions.

Differences in laws can also affect the free movement of goods within the Community.

## APPENDIX 5

### Hague Convention on The Law Applicable to Products Liability

The States signatory to the present Convention.

Desiring to establish common provisions on the law applicable, in international cases, to products liability,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions —

#### Article 1

This Convention shall determine the law applicable to the liability of the manufacturers and other persons specified in Article 3 for damage caused by a product, including damage in consequence of a misdescription of the product or of a failure to give adequate notice of its qualities, its characteristics or its method of use.

Where the property in, or the right to use, the product was transferred to the person suffering damage by the person claimed to be liable, the Convention shall not apply to their liability *inter se.*

This Convention shall apply irrespective of the nature of the proceedings.

#### Article 2

For the purposes of this Convention —

a. the word 'product' shall include natural and industrial products, whether raw or manufactured and whether movable or immovable;

b. the word 'damage' shall mean injury to the person or damage to property as well as economic loss; however, damage to the product itself and the consequential economic loss shall be excluded unless associated with other damage;

c. the word 'person' shall refer to a legal person as well as to a natural person.

#### Article 3

This Convention shall apply to the liability of the following persons —

1. manufacturers of a finished product or of a component part;

2. producers of a natural product;

3. suppliers of a product;

4. other persons, including repairers and warehousemen, in the commercial chain of preparation or distribution of a product.

It shall also apply to the liability of the agents or employees of the persons specified above.

**Article 4**

The applicable law shall be the internal law of the State of the place of injury, if that State is also —

a. the place of the habitual residence of the person directly suffering damage, or

b. the principal place of business of the person claimed to be liable, or

c. the place where the product was acquired by the person directly suffering damage.

**Article 5**

Notwithstanding the provisions of Article 4, the applicable law shall be the internal law of the State of the habitual residence of the person directly suffering damage, if that State is also —

a. the principal place of business of the person claimed to be liable, or

b. the place where the product was acquired by the person directly suffering damage.

**Article 6**

Where neither of the laws designated in Articles 4 and 5 applies, the applicable law shall be the internal law of the State of the principal place of business of the person claimed to be liable, unless the claimant bases his claim upon the internal law of the State of the place of injury.

**Article 7**

Neither the law of the State of the place of injury nor the law of the State of the habitual residence of the person directly suffering damage shall be applicable by virtue of Articles 4, 5 and 6 if the person claimed to be liable establishes that he could not reasonably have foreseen that the product or his own products of the same type would be made available in that State through commercial channels.

**Article 8**

The law applicable under this Convention shall determine, in particular —

1. the basis and extent of liability;

2. the grounds for exemption from liability, any limitation of liability and any division of liability;

3. the kinds of damage for which compensation may be due;

4. the form of compensation and its extent;

5. the question whether a right to damages may be assigned or inherited;

6. the persons who may claim damages in their own right;

7. the liability of a principal for the acts of his agent or of an employer for the acts of his employee;

8. the burden of proof insofar as the rules of the applicable law in respect thereof pertain to the law of liability;

9. rules of prescription and limitation, including rules relating to the commencement of a period of prescription or limitation, and the interruption and suspension of this period.

**Article 9**

The application of Articles 4, 5 and 6 shall not preclude consideration being given to the rules of conduct and safety prevailing in the State where the product was introduced into the market.

**Article 10**

The application of a law declared applicable under this Convention may be refused only where such application would be manifestly incompatible with public policy ('ordre public').

**Article 11**

The application of the preceding Articles shall be independent of any requirement of reciprocity. The Convention shall be applied even if the applicable law is not that of a Contracting State.

**Article 12**

Where a State comprises several territorial units each of which has its own rules of law in respect of products liability, each territorial unit shall be considered as a State for the purposes of selecting the applicable law under this Convention.

**Article 13**

A State within which different territorial units have their own rules of law in respect of products liability shall not be bound to apply this Convention where a State with a unified system of law would not be bound to apply the law of another State by virtue of Articles 4 and 5 of this Convention.

**Article 14**

If a Contracting State has two or more territorial units which have their own rules of law in respect of products liability, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them, and may modify its declaration by submitting another declaration at any time.

These declarations shall be notified to the Ministry of Foreign Affairs of the Netherlands, and shall state expressly the territorial units to which the Convention applies.

**Article 15**

This Convention shall not prevail over other Conventions in special fields

to which the Contracting States are or may become Parties and which contain provisions concerning products liability.

**Article 16**

Any Contracting State may, at the time of signature, ratification, acceptance, approval or accession, reserve the right —

1. not to apply the provisions of Article 8, subparagraph 9;

2. not to apply this Convention to raw agricultural products.

No other reservations shall be permitted.

Any Contracting State may also when notifying an extension of the Convention in accordance with Article 19, make one or more of these reservations, with its effect limited to all or some of the territories mentioned in the extension.

Any Contracting State may at any time withdraw a reservation it has made; the reservation shall cease to have effect on the first day of the third calendar month after notification of the withdrawal.

**Article 17**

This Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Twelfth Session.

It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

**Article 18**

Any State which has become a Member of the Hague Conference on Private International Law after the date of its Twelfth Session, or which is a Member of the United Nations or of a specialized agency of that Organisation, or a Party to the Statute of the International Court of Justice may accede to this Convention after it has entered into force in accordance with Article 20.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

**Article 19**

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

**Article 20**

This Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance or approval referred to in the second paragraph of Article 17.

Thereafter the Convention shall enter into force

— for each State ratifying, accepting or approving it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance or approval;

— for each acceding State, on the first day of the third calendar month after the deposit of its instrument of accession;

— for a territory to which the Convention has been extended in conformity with Article 19, on the first day of the third calendar month after the notification referred to in that Article.

**Article 21**

This Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 20, even for States which have ratified, accepted, approved or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands, at least six months before the expiry of the five year period. It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

**Article 22**

The Ministry of Foreign Affairs of the Netherlands shall notify the States Members of the Conference and the States which have acceded in accordance with Article 18, of the following —

1. the signatures and ratifications, acceptances and approvals referred to in Article 17;

2. the date on which this Convention enters into force in accordance with Article 20;

3. the accession referred to in Article 18 and the dates on which they take effect;

4. the extensions referred to in Article 19 and the dates on which they take effect;

5. the reservations, withdrawals of reservations and declarations referred to in Articles 14, 16 and 19;

6. the denunciations referred to in Article 21.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the ... day of ... 19 , in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States Members of the Hague Conference on Private International Law at the date of its Twelfth Session.